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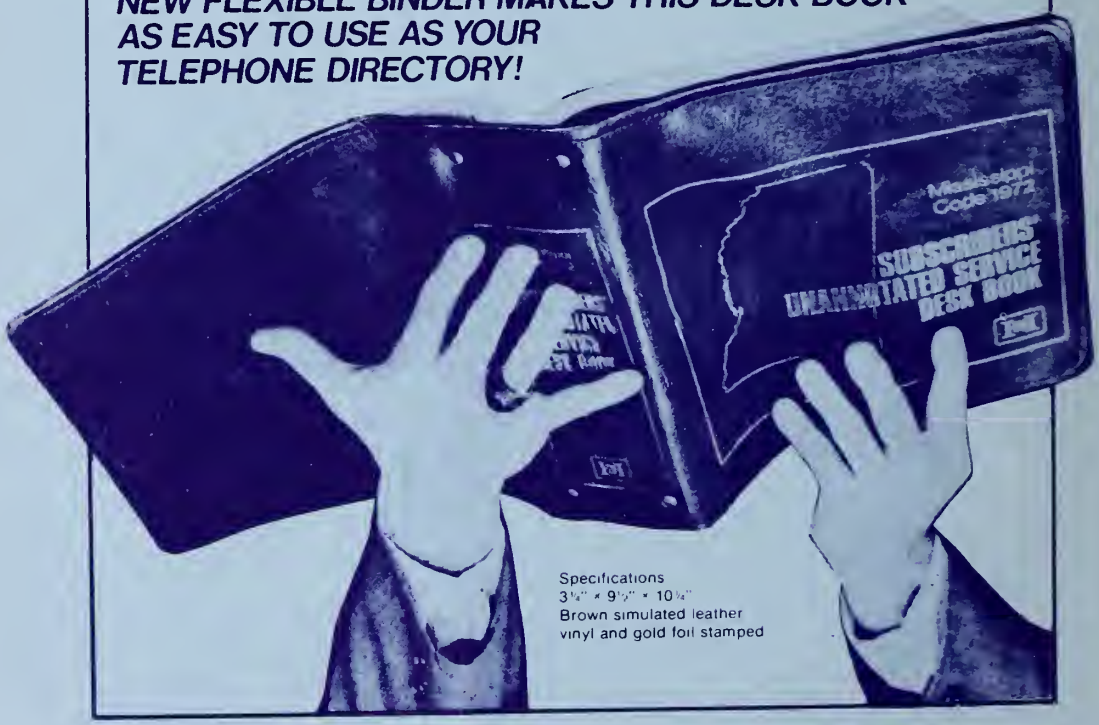
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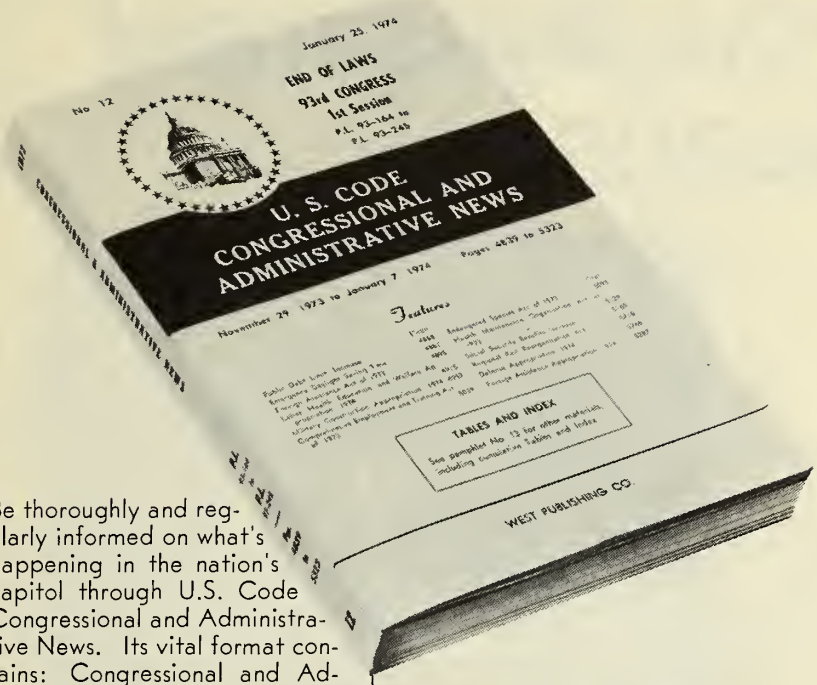

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IN MEMORIAM: EARL WARREN

*George Colvin Cochran**

On Wednesday evening, July 10, the fourteenth Chief Justice of the United States died. Unlike John Marshall, his greatness did not spring from a gift of exceptional intellectual talent. Rather, it lay in his unique ability to conceptualize the Constitution as existing within a framework of ethical principles which in every case imposed a duty on the Court to determine the "right" and "moral" thing to do. His concept of "rightness," when applied within the context of the principle "Equal Justice Under Law" emblazoned above the entrance of the Supreme Court building, forced Americans to look squarely at the contradictions between professed beliefs and actual behavior and attitudes. It required a resolution of those contradictions in favor of our democratic heritage. Earl Warren was a figure of benevolence and common sense who with both confidence and humility transformed an institution apparently beyond change. During an era of apathy and affluence he offered the country a source of compassion and individual rights. It was restoration for some, odd radicalism to others, but even those most affronted attended to and responded to the power in the center: the man who both in substance and form led the Warren Court.

For those who served as his clerks he will always be remembered as "The Chief." Although the Editors have been kind enough to call upon me to ferret through the pleasant memories of the man, the closeness of his funeral makes such a task impossible. One tribute, however, is appropriate. The past president of the American Bar Association recently reviewed, in his words, "the greatest political scandal in American history," and, while reaffirming his abiding faith in the great majority of lawyers, concluded:

> Yet I suspect that my personal knowledge that this is true is not acceptable today by many of our fellow citizens and that the lawyer in America is more generally disliked and distrusted than ever before in the history of our profession in the United States . . . .[1]

Events of the past two years have startlingly revealed to the American public the partial and sometimes total desecration of public service by men in all levels of government whose decisions were tainted by selfish economic incentives. The respect for those holding public office is perhaps best demonstrated by citizens who caustically condone this

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[1]Address by Robert W. Meserve, Opening Session, American Bar Ass'n Annual Convention, August 1973, *reprinted in* 59 A.B.A.J. 985 (1973).

type of malfeasance with the now familiar phrase, "Well, they all do it."

But not Earl Warren.

The late Chief Justice spent half a century of his life honestly serving the people of this country in several capacities. During this period he purposefully limited his income to salaries afforded him by the state and federal governments. In his infrequent comments on the subject, he enthusiastically spoke of his pride in fulfilling the trust imposed by those who placed him in office. Needless to say, the absolute separation of public officials from actual or potential economic compromise was a deeply felt value and one which he expected of those with whom he associated.

As we inevitably move out of this period of national disgrace, it is for this virtue of conscience that I, personally, would want Earl Warren to be remembered. His concept of moral obligation must be instilled in every law student, carried by every lawyer, and fulfilled by those who enter public service if the now deep-seated resentments carried by a majority of Americans are to be ameliorated. Perhaps the greatest tragedy of his death is that it came at a time when America was just beginning to look closely at its public officials in search of those values for which Earl Warren stood.

A SURVEY OF FEDERAL AND MISSISSIPPI ENVIRONMENTAL LAW WITH AN EXAMINATION OF ITS EFFECT ON LAND DEVELOPMENT†

Guthrie T. Abbott and Eugene T. Holmes***

I. Introduction

There has been strong debate recently in Congress and around the nation over whether there should be any federal or state controls on the development and use of land.[1] Although that question is unsettled, the authors believe that federal and state land use controls already exist and are being applied under the guise of environmental protection. To support this thesis, this article traces the history of environmental pollution and control from ancient times through the period of heightened interest in environmentalism which spawned the National Environmental Policy Act (NEPA),[2] the Clean Air Act (CAA),[3] and the Federal Water Pollution Control Act (FWPCA).[4] These three federal acts are examined briefly, along with a typical state pollution control act—the Mississippi Air and Water Pollution Control Act[5]—and an example of a

†The authors wish to acknowledge the Legal Institute of Agricultural and Resource Development at the University of Mississippi School of Law for funding a portion of the research for this article.

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**Editorial Board, *Mississippi Law Journal*.

[1]During the preparation of this article, Congress was considering two federal land use planning bills, the National Land Use Policy and Planning Assistance Act (H.R. 10249) and a weaker Administration-supported bill (H.R. 13790) drafted by the United States Chamber of Commerce and introduced by Representative Sam Steiger of Arizona. On June 11, 1974, chances for passage of the National Land Use Policy and Planning Assistance Act were virtually ended for this year when the House refused to debate the bill by a vote of 211 to 204. Time, June 24, 1974, at 76.

[2]42 U.S.C. §§ 4321 *et seq.* (1970).

[3]42 U.S.C. §§ 1857 *et seq.* (1970), *as amended*, (Supp. I, 1971), (Supp. II, 1972). The recent amendments to the Act arising from the energy crisis do not go beyond authorizing a 2-year extension of some deadlines and allowing some sources to go back to coal after being forced away from it 3 years ago. Accordingly, these newest amendments will not receive any further attention here.

[4]33 U.S.C. §§ 1251 *et seq.* (Supp. II, 1972).

[5]The Mississippi Act was first enacted as Chapter 258, Mississippi Laws of 1966. Since then it has been amended four times. It is codified at Mississippi Code Annotated of 1972, Sections 49-17-1 to -43. Even the 1972 Code is partially outdated by virtue of the 1972

state bill enacted for the protection of coastal lands—the Mississippi Wetlands Law.[6] The focus then shifts to recent court-ordered regulations of the United States Environmental Protection Agency (EPA)[7] which in fact will affect state and federal land use control through the "non-degradation" clause and the "indirect sources" clause of the Clean Air Act.[8] Finally, some conclusions are drawn and some recommendations are advanced. The authors hope that this article will acquaint the reader with the rudiments of federal and Mississippi environmental law practice while providing sufficient citation of authority for the reader to explore any subject discussed in greater depth.

II. History of Environmental Protection

A. Early History

1. Pollution in Ancient Times

Perhaps the earliest known references to the problems of air and water pollution are found in the Bible.[9] Hippocrates, the Father of Medicine, commented on the foul, smoky air of Greek cities in the 4th Century B.C.[10] The first real attempt to deal with water pollution was probably the Cloaca Maxima (or Great Sewer), constructed in ancient Rome so that the city's waterborne wastes could be transported to the Tiber River for dilution and natural biodegradation.[11] Vitruvius, a Roman architect of the Augustan period, recommended lining Rome's streets with trees to keep the air fresh centuries before the oxygen-producing ability of plants was understood. Roman patricians complained in their diaries that soot from burning charcoal smudged their togas, and the philosopher Seneca wrote: "As soon as I had escaped the heavy air of

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and 1973 amendments to the Act. This article points out the differences. The latest statutes and regulations, as amended, are available from the Mississippi Air and Water Pollution Control Commission, Post Office Box 827, Jackson, Mississippi 39205. Our statute could use further amendment, as this article suggests.

[6]Miss. Code Ann. §§ 49-27-1 to -69 (Supp. 1973).

[7]EPA was created by Congress, on President Nixon's recommendation, on December 2, 1970. Wide ranging powers were given to the new agency from other departments (*e.g.*, Interior, Agriculture, and Health, Education and Welfare), and Congress and the courts have since bestowed even more authority upon EPA. Fears voiced during the 1973-74 Arab oil embargo that EPA was dying were not well-founded. EPA is alive, well, and growing. Indeed, as will be shown, EPA is reaching the stage of bureaucratic maturity where it has begun to fill legal vacuums by extending its own regulations to cover for congressional inaction on new fronts, such as land use control.

[8]These regulations will be discussed in detail in section V *infra*.

[9]*See, e.g., Exodus* 7:21, 9:10; *Revelation* 8:11, 9:4.

[10]J. Newman, Our Poisoned Planet 93 (1970).

[11]*History of State and Local Pollution Laws*, in Industrial Pollution Control Handbook 3-1 to 3-2 (H. Lund ed. 1971).

Rome and the stench of its smoky chimneys which when stirred poured forth whatever pestilent vapors and soot they enclosed, I felt a change in my disposition."[12]

2. Medieval Pollution Control

In the reign of Edward I of England, the first air pollution control law was passed. This was the Sea Coals Act of 1273, and it forbade the burning of soft coal in London, a city already plagued by smoke, particulate matter, and sulfur oxides. In 1307 a man was convicted of violating this statute and was hanged—the only man in history to be put to death in the name of air pollution control.[13] Richard III (r. 1377-99) first used the incentive of taxation to control pollution by placing a levy on the use of coal in England, while Henry V (r. 1413-22) created a coal use commission,[14] the probable progenitor of our modern environmental bureaucracy.

In 1661, during the reign of Charles II, a pamphlet was written by John Evelyn, one of the founding members of the Royal Society.[15] This pamphlet is commonly accepted as the first technical work on air pollution control. In 1686 an Englishman named Justel published *An Account of an Engine that Consumes Smoke* which dealt with air pollution control technology. Thus it is clear that the problem of air pollution was at least partially understood and that control devices were available as early as the 17th century.[16] It is also clear that this knowledge was not used, since the contamination of London's air increased steadily during the following two centuries. By the 19th century the poet Percy Bysshe Shelley wrote: "Hell is much a city like London, a populous and smokey city."[17]

A similar tale could be told for water pollution, but a simple quote from Samuel Taylor Coleridge (1772-1834) will suffice to describe the condition of Europe's rivers by the dawn of the Industrial Revolution:

> The river Rhine, it is well known,
> Doth wash your city of Cologne;

---

[12]J. NEWMAN, *supra* note 10, at 93.

[13]*Id.* at 94. Though 13th century Edinburgh was known as "Auld Reekie" because of its smoking chimney pots, London has historically been the world leader for continuous heavy air pollution and has only recently relinquished this dubious distinction to Tokyo, Japan. Other aspirants for the title include New York City, Los Angeles, Rotterdam, and the Ruhr Valley in Germany.

[14]Chambers, *Classification and Extent of Air Pollution Problems,* in 1 AIR POLLUTION AND ITS EFFECTS 5 (1968).

[15]The pamphlet was entitled *Fumifugium; or The Inconvenience of the Aer and Smoke of London Dissapated together with Some Remedies Humbly Proposed. Id.*

[16]Chambers, *supra* note 14, at 5.

[17]J. NEWMAN, *supra* note 10, at 94.

But tell me, Nymphs! what power divine
Shall henceforth wash the river Rhine?[18]

3. Pollution Control After the Industrial Revolution

The Industrial Revolution of the 18th century greatly exacerbated air and water pollution problems in Europe and the United States. During the next century a series of regulations was passed in both places. Water pollution control efforts were aimed primarily at the elimination of waterborne infectious diseases such as typhoid fever, cholera, hepatitis, dysentery, tuberculosis, and tularemia.[19] Air pollution control efforts of this period were also primarily health related. It is only a recent development that factors other than public health have been considered in environmental regulations.[20]

4. The Role of Common-Law Remedies in Pollution Control

The task of controlling pollution has fallen mainly to the Congress and the state legislatures. This is not to say, however, that common-law remedies have not played an important part in the struggle to control pollution. Actions based on such theories as nuisance, trespass, negligence, the law of easements, or strict liability have been brought successfully to ameliorate the plight of individual citizens.[21] The major reason legislatures have been forced to the forefront in this area is that the court system is not equipped to handle a problem of the magnitude of pollution control in a manner that would develop a consistent policy which could be relied upon for making long-range plans.[22] Courts are necessarily concerned primarily with determining the rights and liabilities of the immediate litigants as opposed to establishing policy for the state or nation, and most judges are ill-equipped to render far-reaching decisions on such technical matters, especially in light of the fact that a private action will not bring into consideration many factors of importance to the region affected. These considerations have caused some courts to defer such decisions to an administrative agency in cases of

[18]S. COLERIDGE, *Cologne* lines 7-10 (1828), in THE POETICAL WORKS OF SAMUEL TAYLOR COLERIDGE 452 (J. Cambell ed. 1914).

[19]C. VELZ, APPLIED STREAM SANITATION 234-35 (1970).

[20]The Clean Air Act, discussed *infra*, sets up a two-tiered system of ambient air quality standards. The primary standards are those required to protect public health. The more difficult and expensive secondary standards are designed to safeguard public welfare (*e.g.*, to prevent blackening of paint on houses by sulfides or the crop-damaging effects of certain pollutants).

[21]Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126, 1126-29.

[22]C. MEYERS & A. TARLOCK, SELECTED LEGAL AND ECONOMIC ASPECTS OF ENVIRONMENTAL PROTECTION 71 (1971).

concurrent jurisdiction by invoking the primary jurisdiction doctrine.[23] Private actions seeking common-law remedies, however, will continue to be valuable weapons in the attorney's arsenal, for the private citizen often is not afforded an adequate recourse for his wrongs by the legislative enactments in the environmental area.[24]

Even though a complete discussion of common-law remedies is beyond the scope of this article, a brief outline of the types of actions which have been used in environmental controversies is offered. From very early times the law of nuisance[25] has been utilized as a means for the protection of private property rights, and, in Mississippi, the courts appear to have extended the theory of nuisance to allow recovery based on principles of strict liability.[26] An increased concern with ecological matters should broaden the scope of nuisance law,[27] and such actions will continue to provide a valuable recourse as a supplement to statutory law protecting the rights of the private citizen. It should be noted, however, that the injured citizen has not always been afforded the relief that he desires. When faced with decisions such as that in the New York case of *Boomer v. Atlantic Cement Co.*,[28] wherein the individual plaintiffs were asking the court to order the closing of a $45 million plant which employed 300 persons because of the plant's pollution of the air, courts of equity have often decided to "balance the equities"[29] and award the plaintiff monetary damages for past and future injury while refusing injunctive relief. A strong dissenting opinion in *Boomer* makes a persuasive argument that the majority was allowing inverse condemnation by a private entity for private gain.[30]

Actions founded on theories of negligence, trespass, and the law of easements have also played large roles in environmental litigation. The negligence cases frequently involve arguments concerning ultrahazar-

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[23]*See, e.g.*, White Lake Improvement Ass'n v. City of Whitehall, 22 Mich. App. 262, 177 N.W.2d 473 (1970). For a general discussion of this doctrine see Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037 (1964).

[24]The actions that may be brought by private citizens under each legislative act treated in this article are discussed in the following sections: The Clean Air Act at section III (B) (9); The FWPCA at section III (C) (6); The Mississippi Air and Water Pollution Control Act at section IV(A); The Mississippi Coastal Wetlands Protection Law at section IV(B).

[25]For a thorough discussion of the concepts of recovery for nuisance see Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

[26]Comment, *Absolute Liability in Mississippi under the Theory of Nuisance*, 42 MISS. L.J. 488 (1971).

[27]*Id.*

[28]26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

[29]Juergensmeyer, *supra* note 21, at 1130-35.

[30]Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 228, 257 N.E.2d 870, 876, 309 N.Y.S.2d 312, 319 (1970) (Jasen, J., dissenting).

dous activities and bring forth questions of strict liability.[31] The theory of trespass is sometimes more suitable to the injured party because of the less stringent requirements for proving damages and the fact that statutes of limitations are often longer for trespass.[32] Where pollution has existed for a period of time, one must be aware that the pollution-producing activity may have ripened into a right under the doctrine of prescription. Under this doctrine, an easement may be acquired in a manner similar to that by which ownership of a possessory interest is acquired by adverse possession.[33]

Legislation in several states has provided citizens with remedies that may be used in situations where common-law remedies have previously been the only recourse. In 1970 Michigan enacted the first state environmental law[34] to give citizens the undisputed right to bring polluters into court. A recent study of the citizens' suits brought under the Michigan Act and the acts of the seven states which have similar legislation shows that as of October 1, 1973, only Michigan had more than a dozen cases.[35] The Michigan experience, however, has shown that the use of such state acts might diminish the use of common-law remedies.[36]

Comprehensive legislative acts are certainly the backbone of environmental law today, but if a practicing attorney is to represent a client in environmental litigation, he or she must keep in mind the utility of the common-law remedies discussed above.

B. History of Federal Environmental Legislation

1. Water Pollution Control

Under the commerce clause,[37] Congress has jurisdiction over waters that are capable of use in interstate commerce whether the waters are interstate or intrastate. The Rivers and Harbors Act of 1899[38] (specifically section 13 thereof, known as the Refuse Act[39]) prohibits the discharge of refuse matter of any kind, other than liquid wastes flowing from streets and sewers, into navigable waters, or tributaries thereof,

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[31]Juergensmeyer, *supra* note 21, at 1142-54; Comment, *supra* note 26, at 499-502.

[32]Juergensmeyer, *supra* note 21, at 1138.

[33]*Id.* at 1136.

[34]Michigan Environmental Protection Act of 1970, MICH. STAT. ANN. §§ 14.528 (201)-(207) (1970).

[35]18 MICH. L. QUADRANGLE NOTES 4, 4-5 (No. 2 1974).

[36]Some 74 cases have been filed in Michigan with the typical case involving a land-development controversy and being brought by a local group as opposed to a national environmental organization. *Id.*

[37]U.S. CONST. art. I, § 8, cl. 2.

[38]33 U.S.C. §§ 401-13 (Supp. 1973).

[39]*Id.* § 407.

without a permit from the Secretary of the Army. While this statute was originally intended for and was long applied only to refuse which might impede navigation, judicial interpretation of it in the 1960's[40] and an executive order in 1970[41] made it applicable to all discharges which might contribute to pollution of navigable waters. The discharge permit program established by the 1970 executive order was incorporated into the Federal Water Pollution Control Act (FWPCA) by the 1972 Amendments to the FWPCA, and is discussed in the section of this article on the FWPCA.[42]

There were other early federal attempts at water pollution control, including the Public Health Service Act of 1912 and the Oil Pollution Act of 1924,[43] but the federal government, deferring to states' rights advocates, generally refrained from direct control of water pollution until after World War II. In 1948 the first Water Pollution Control Act was passed.[44] The 1948 Act established the National Water Pollution Control Board and authorized a 5-year program of research and financial assistance to state agencies, under the control of the Surgeon General. The 1948 Act was strengthened in 1952[45] and established as a permanent program with major additions in the area of enforcement in 1956.[46] The 1956 Act was a major step in the fight against water pollution because of the provisions directing the states to establish water quality

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[40]*See, e.g.*, United States v. Standard Oil Co., 384 U.S. 224 (1966); United States v. Republic Steel Corp., 362 U.S. 482 (1960); and United States v. Esso Standard Oil Co. of Puerto Rico, 375 F.2d 621 (3d Cir. 1967), for the development of this novel judicial theory. Justice Douglas wrote the majority opinions in both *Republic Steel* and *Standard Oil*. Justice Harlan's powerful dissents in both cases were of little solace to the corporate officials convicted of criminal violations of an act that nobody, including the Corps of Engineers (who had never issued permits to industrial dischargers), thought applied to them.

[41]Exec. Order No. 11,547, 35 FED. REG. 19627 (1970). The text of Exec. Order No. 11,547 may be found in A. REITZE, ENVIRONMENTAL LAW One-9 to -11 (2d ed. 1972). This permit program was effectively halted by the decision in Kalur v. Resor, 335 F. Supp. 1 (D.D.C. 1971), that NEPA required a full environmental impact statement for each of the 20,000 permits the Corps of Engineers had in the works. Hoping that this impossible situation would soon force Congress to amend the FWPCA to vest the discharge permit program in EPA, along with an exemption from NEPA for such permits, the Corps declined to appeal the district court's decision. This strategy paid off for the Corps, as shown in the discussion of the 1972 Amendments to the FWPCA *infra*.

[42]The text of the Rivers and Harbors Act, together with its judicial and administrative gloss, can be found in O. GRAY, CASES AND MATERIALS ON ENVIRONMENTAL LAW 987-1029 (2d ed. 1973).

[43]Stein, *Enforcement in Water Pollution Control—the Federal Viewpoint*, 43 WATER POLLUTION CONTROL FEDERATION J. 179, 179-81 (1971).

[44]Ch. 758, 80 Stat. 1155 (1948), *as amended*, FWPCA, 33 U.S.C. §§ 1251 *et seq.* (Supp. II, 1972).

[45]Act of July 17, 1952, ch. 927, 66 Stat. 755.

[46]Act of July 9, 1956, ch. 518, 70 Stat. 498.

standards and the provisions establishing a three-step enforcement procedure.[47] The three steps in the procedure required that there first be a conference of major polluters in a given river basin with state and federal authorities. If the problem was not resolved by the conference technique, the second step was a public hearing. Only if the conference and public hearing failed to bring compliance was the government empowered to bring an action in court. This three-step enforcement procedure, which still exists as part of the current statute,[48] has been severely criticized because of the inordinate amount of time required to complete the process.[49] The fact that the lengthy conference procedure has been used infrequently, with only one case having gone to court,[50] is a major reason for the additional enforcement methods provided by the 1972 amendments to the FWPCA.[51]

Because of strong state resistance to federal encroachment into what the states regarded as traditionally a state police power function, a 1959 bill strengthening FWPCA was vetoed by President Eisenhower.[52] In 1961, however, federal enforcement authority was extended for the first time to purely intrastate water. Additionally, the federal program was transferred from the Surgeon General to the Secretary of Health, Education and Welfare.[53]

Environmental considerations were included in the Public Works and Economic Development Act of 1965, the Housing and Urban Development Act of 1965, the Consolidated Farmers Home Loan Administration Act of 1965, and the Demonstration Cities Act of 1966.[54] The Water Quality Act of 1965[55] increased substantially the federal role in water pollution control by establishing the Federal Water Pollution Control Administration and empowering it to set and enforce water quality standards whenever state standards or enforcement was inadequate. The Clean Water Restoration Act of 1966[56] transferred the Federal Water

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[47]*Id.*

[48]See the discussion of the 1972 FWPCA amendments *infra*.

[49]*See, e.g.*, D. ZWICK & M. BENSTOCK, WATER WASTELAND 266-67 (1971).

[50]A. REITZE, ENVIRONMENTAL LAW Four-70 to -71 (2d ed. 1972).

[51]*See* section III(C)(4) *infra*.

[52]The FWPCA Amendments of 1972 were vetoed by President Nixon. Unlike Eisenhower's veto of the 1959 bill, Nixon's inflation-induced veto was easily overridden by an environmentally aroused Congress. *See* 4 ENVIRONMENTAL ACTION, October 28, 1972, at 5.

[53]For a more detailed history of early federal water pollution control legislation see Blatnik, *History of Federal Pollution Control Legislation*, in INDUSTRIAL POLLUTION CONTROL HANDBOOK 2-2 (F. Lund ed. 1971).

[54]*Id.* at 2-4 to -5.

[55]Pub. L. No. 89-234, 79 Stat. 903 (1965).

[56]Pub. L. No. 89-753, 80 Stat. 1246 (1966). The 1966 Act was not the only act to move federal water pollution control authority from one department to another. From the Surgeon General (1948), this authority went to HEW (1961), to Interior (1966), and finally to

Pollution Control Administration from the Department of Health, Education and Welfare to the Interior Department and authorized $3 billion for research, planning and enforcement, and grants for construction of sewage treatment plants.

The Water Quality Improvement Act of 1970[57] strengthened the law in several areas, including: mine drainage, eutrophication, problems of the Great Lakes, pesticides, pollution from federal government activities, pollution from vessels, and hazardous pollutants.[58] Clearly, there was significant federal water pollution control authority even before the passage of the revolutionary 1972 amendments to the FWPCA.

2. Air Pollution Control

The federal role in air pollution control for many years was minor, with most air pollution problems having been considered local nuisances within the exclusive ambit of the states' police powers. National concern over air pollution first surfaced in 1907 with the formation of the Smoke Prevention Association and in 1912 when the Bureau of Mines began a series of studies of air pollution and its abatement. Although a number of air pollution control bills were introduced in Congress during the first half of the 20th century, all of them either failed to pass or were vetoed.[59]

With the massive industrialization that accompanied World War II, the nation's air pollution problems worsened. The proliferation of automobiles also contributed to the contamination during this period. The Public Health Service Act of 1944 empowered the Surgeon General to study the health implications of air pollution, but serious federal action was not forthcoming until Congress was spurred by a well-publicized tragedy which focused national attention on the problem.

Donora, Pennsylvania, an industrial suburb of Pittsburgh, suffered a serious air pollution episode in 1948 when a week-long atmospheric inversion effectively placed a lid over the town, trapping and concentrating the emissions from steel mills and other local sources. Twenty people died as a result of the high particulate and sulfur-oxides concentrations, and fully one-third of Donora's population was made ill. Motivated by the national publicity surrounding the Donora episode, President Truman asked the Secretary of the Interior to set up the first

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EPA (1970). Along the way the control authority was called the National Water Pollution Control Board (1948), the National Water Pollution Control Advisory Board (1952), the Federal Water Pollution Control Administration (1965), the Federal Water Quality Administration (1969), and the Water Quality Office of EPA (1970). All of these are not to be confused with the National Water Commission which was established in 1968 to study and report on the nation's long term water requirements.

[57]Pub. L. No. 91-224, 84 Stat. 91 (1970), *as amended*, FWPCA, 33 U.S.C. §§ 1251 *et seq.* (Supp. II, 1972).

[58]Stein, *supra* note 43, at 181.

[59]Blatnik, *supra* note 53, at 2-1 to -2, 2-23.

United States Technical Conference on Air Pollution. This conference, attended by government and industry officials and representatives of conservation groups, met in 1950 and recommended that the federal government assume leadership of the air pollution control effort.[60]

Bills aimed at enlarging the federal role in air pollution control were introduced in Congress in 1952 and 1954 but failed to pass. In 1955 President Eisenhower asked for effective air pollution control legislation in his State of the Union message. Public Law 84-159, passed that year, strengthened existing federal programs and increased federal funding for state programs. Aided by publicity from air pollution episodes which killed 4,000 in London in 1952 and 200 in New York City in 1953, the pro-federal control lobby finally carried the day in 1963 with the passage of the Clean Air Act of 1963.[61] This Act increased federal funding of state activities and provided for direct federal enforcement in interstate air-pollution cases and, upon state request, in intrastate cases. The Secretary of HEW was directed to develop and promulgate air quality criteria to assist state and local agencies in establishing air quality standards and emissions standards. Also, the three-step enforcement procedure (conference, public hearing, court action) was borrowed from the Water Pollution Control Act and adopted in air pollution control. The Air Quality Act of 1967[62] further extended federal authority by authorizing the Secretary of HEW to set air quality standards for any state whose standards were inadequate; to enforce air quality standards directly, via the three-step procedure (except in cases of imminent danger to public health, in which cases he could go to court immediately); to set standards for automotive emissions; and to designate air quality control regions. Funding was increased for research and planning, and the President's Air Quality Advisory Board and the National Air Pollution Control Administration (NAPCA) were established.[63] The Clean Air Amendments of 1969 provided more research funds but contained no new regulatory provisions. By the eve of the passage of the 1970 Amendments to the Clean Air Act, NAPCA had classified 300 American cities as suffering from *severe* air pollution and had reported that *every* city of over 50,000 had an air pollution problem.[64]

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[60]*Id.* at 2-22 to -23.

[61]Pub. L. No. 88-206, 77 Stat. 392 (1963), *as amended*, 42 U.S.C. §§ 1857 *et seq.* (1970).

[62]Pub. L. No. 90-148, 81 Stat. 485 (1967), *as amended*, 42 U.S.C. §§ 1857 *et seq.* (1970).

[63]NAPCA was moved from HEW to EPA in 1970 and became EPA's Office of Air Quality.

[64]J. NEWMAN, *supra* note 10, at 94.

III. Current Federal Environmental Statutes

A. *The National Environmental Policy Act of 1969*

Much has been written elsewhere[65] about the National Environmental Policy Act of 1969[66] (NEPA), so it will be only cursorily reviewed here. Basically, NEPA does four things. It declares a national policy of creating and maintaining "conditions under which man and nature can exist in productive harmony";[67] it directs all federal agencies to reassess their policies and programs to take full account of environmental considerations;[68] it requires that environmental impact statements be prepared and circulated for all "major federal actions significantly affecting the quality of the human environment";[69] and it creates a Council on Environmental Quality (CEQ) to review these environmental impact statements, advise the President on environmental matters, and promulgate guidelines for implementation of NEPA.[70]

From the point of view of the land developer, the important question is whether NEPA applies to the project he is contemplating. The key words in section 102(2)(c) are "major," "federal actions," and "significantly affecting the quality of the human environment." Unless a project meets all three of these tests, an impact statement is not required. For example, a landowner could cut and sell all the trees on a large tract of privately owned land without having to worry about NEPA. Even though felling the trees might "significantly affect" the environment of the area, it is not a *federal* action. Cutting the trees on

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[65]Probably the best authority on NEPA is F. Anderson, NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act (1973). Professor Gray has a thorough analysis of NEPA in his book, O. Gray, Cases and Materials on Environmental Law (2d ed. 1973) at 1-166. Another new book, Environmental Planning: Law of Land and Resources (1974), by Professor Arnold Reitze, Jr., of George Washington University, also treats NEPA fully. In addition, there have been literally hundreds of law review articles on NEPA. Three of the best are: Friedman, *The National Environmental Policy Act of 1969—The Brave New World of Environmental Legislation*, 6 Natural Resources L. 44 (1973); Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 Colum. L. Rev. 612 (1970); and Yannacone, *National Environmental Policy Act of 1969*, 1 Envir. L. 8 (1970).

[66]42 U.S.C. §§ 4321 *et seq.* (1970) (originally enacted as Pub. L. No. 91-190, 83 Stat. 852).

[67]42 U.S.C. § 4331(a) (1970).

[68]*Id.* § 4333.

[69]*Id.* § 4332(2)(C). The environmental impact statements are known in the jargon of environmental law as "102" statements since NEPA § 102(2)(C) is the section requiring them.

[70]NEPA, Title II (42 U.S.C. §§ 4341-47) (1970). CEQ published guidelines for preparing and evaluating environmental impact statements in April 1971. *See* 36 Fed. Reg. 7724-29 (1971). The guidelines are reprinted in F. Anderson, *supra* note 65, at 308; and in O. Gray, *supra* note 42, at 10.

public lands would be, though, and many NEPA cases have arisen in this context. Similarly, building a new house financed with a VA or FHA insured loan might arguably be a "federal action," but surely it is not a "major" action, nor does it "significantly affect the quality of the human environment." There is, then, a continuum in these criteria—the importance of the federal involvement (the size of the federal "handle") and the significance of the environmental impact of the project. Clearly, a nuclear power plant, which requires a major federal involvement in the form of Atomic Energy Commission construction and operating licenses, would fall within NEPA's ambit. Just as clearly, a large project requiring no federal licenses, permits, or other involvement would not be within NEPA, nor would the small project with federal involvement such as the VA-financed house. Closer questions arise between these extremes, and NEPA has been used to challenge (unsuccessfully) the construction of large federally subsidized or insured housing projects,[71] location of federally financed jails,[72] and even a mock amphibious assault on an oceanside state park.[73] NEPA has been held to require environmental impact statements for a HUD loan of $3.1 million for construction of a 16-story apartment building,[74] a permit for construction of a pulp mill on 200 acres in a national forest,[75] a federal grant of $775,000 for construction of a prison medical facility in a rural, historic section of Virginia,[76] a 5-block urban renewal project in Washington, D.C.,[77] a review by the National Capital Planning Commission of plans for a private shopping mall and housing complex in Washington, D.C.,[78] a loan by the FHA for construction of a park and golf course in Texas,[79]

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[71]*See, e.g.*, Echo Park Residents Comm. v. Romney, 2 ENVIRON. L. REP. 20337 (C.D. Cal. May 11, 1971); Hiram Clarke Civic Club v. Romney, 2 ENVIRON. L. REP. 20362 (S.D. Tex. Dec. 22, 1971), *aff'd sub nom.* Hiram Clarke Civic Club v. Lynn, 476 F.2d 421 (5th Cir. 1973). *Echo Park* and *Hiram Clarke Civic Club* refused to find "major federal action" significantly affecting the quality of the human environment in a 66-unit or a 272-unit apartment complex. Other courts, however, more concerned with the "social" aspects of environmental quality, might go the other way.

[72]Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

[73]Citizens for Reid State Park v. Laird, 336 F. Supp. 783 (D. Me. 1972).

[74]Goose Hollow Foothills League v. Romney, 334 F. Supp. 877 (D. Ore. 1971).

[75]Sierra Club v. Hardin, 325 F. Supp. 99 (D. Alas. 1971).

[76]Ely v. Velde, 321 F. Supp. 1088 (E.D. Va.), *rev'd in part*, 451 F.2d 1130 (4th Cir. 1971).

[77]Businessmen Affected Severely by the Yearly Action Plans, Inc. v. D.C. City Council, 339 F. Supp. 793 (D.D.C. 1972). This holding seems justified under NEPA although the Supreme Court had earlier held that aesthetics and environmental considerations can *justify* urban renewal projects. Berman v. Parker, 348 U.S. 26 (1954).

[78]McLean Gardens Residents Ass'n v. National Capital Planning Comm'n, 2 ENVIRON. L. REP. 20659 (D.D.C. Oct. 21, 1972).

[79]Texas Committee on Natural Resources v. United States, 2 ENVIRON. L. REP. 20574 (W.D. Tex. Feb. 5, 1970), *vacated*, 430 F.2d 1315 (5th Cir. 1970).

and approval by the comptroller of the currency of an application to open a branch bank in Vermont.[80]

The cases construing the phrase "major federal action significantly affecting the quality of the human environment" are not easily reconcilable. The Second Circuit has formulated this test:

> In the absence of any Congressional or administrative interpretation of the term, we are persuaded that in deciding whether a major federal action will "significantly" affect the quality of the human environment, the agency in charge, although vested with broad discretion, should normally be required to review the proposed action in the light of at least two relevant factors: (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects from the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.[81]

Perhaps the most that can be said is that the "significance" of the environmental impact of a project is a factual question, the judicial resolution of which will be only partially influenced by previous cases or agency determinations. Although one scholar sees a per se category of "major federal actions" evolving for FHA loans, construction loans, interest loans, mortgage guarantees, other HUD activities, and federally approved construction or zoning,[82] the judicial consensus is that stated by the Third Circuit: "Whether a project is a 'major federal action' is, of course, a question which can only be resolved through a careful case-by-case analysis."[83]

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[80]Billings v. Camp, 2 ENVIRON. L. REP. 20687 (D.D.C. Oct. 4, 1972).

[81]Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972). *But see* Judge Friendly's dissent stating that this test may "raise the floor" and allow some actions to escape NEPA's requirements.

[82]F. ANDERSON, *supra* note 65, at 85-86.

[83]Transcontinental Gas Pipe Line Corp. v. Hackensack Meadowlands Development Comm'n, 464 F.2d 1358, 1366 (3d Cir. 1972). Mr. Anderson concedes that this is the "prevailing judicial attitude," but insists that per se categories have begun to evolve in fact. He continues:

> The trend is clearest for highway projects, water resources projects, and electrical generating facilities. It is less clear for housing programs, such as loan and mortgage guarantees, interest grants, and the like.

F. ANDERSON, *supra* note 65, at 84.

As an interesting sidenote, it should be remembered that industry can use NEPA as well as environmentalists. *See, e.g.*, Coahoma Chemical Co. v. Ruckelshaus, 358 F. Supp. 680 (N.D. Miss.), *further proceedings enjoined sub nom.* Environmental Defense Fund v. EPA, 485 F.2d 780 (D.C. Cir.), *aff'd by an equally divided ct. sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973). *Coahoma Chemical* was a challenge to EPA's decision to ban use of the pesticide DDT, alleging that a full-scale environmental impact statement should have been written.

An environmental impact statement is required for a private development involving some federal "handle" (a permit, license, or financial aid) when the project involves a "major federal action significantly affecting the quality of the human environment." Hopefully, the vagueness of this three-pronged test will evaporate as more cases construing it are decided.

Assuming an impact statement is required, it is clear that the agency must write it. The agency, however, will normally require the applicant to assist in developing the data for the statement as a condition to a favorable decision on the application. NEPA requires "a detailed statement by the responsible official on:

> (i) The environmental impact of the proposed action,
> (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) Alternatives to the proposed action,
> (iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[84]

All administrative agencies whose projects fall within NEPA's reach have guidelines as to what projects require these statements and what assistance must be provided by the applicant. Since the affected private developer must get in touch with the relevant agencies anyway for permits, licenses, or financial assistance, he can seek the aid of those agencies with respect to the particular NEPA problems he may face, because the agencies will be facing the same NEPA problems.[85]

Only one federal agency has been exempted from NEPA—the Environmental Protection Agency—and only a portion of its activities have been so exempted. The 1972 Amendments to the Federal Water Pollution Control Act exempt all of EPA's water quality activities except the issuance of discharge permits for new sources and the making of grants for publicly owned waste treatment works.[86] At least one court has held

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[84]42 U.S.C. § 4332(2)(C) (1970).

[85]The reader is again referred to F. ANDERSON, *supra* note 65, and particularly to chapter IV of that source, entitled, "Circumstances Requiring an Impact Statement," at 56-141.

[86]Federal Water Pollution Control Act Amendments of 1972, § 511(c)(1), 86 Stat. 816, 893 (1972). See the discussion of these amendments *infra*. Although codified as 33 U.S.C. §§ 1251 *et seq.* (Supp. II, 1972), the Federal Water Pollution Control Act will be cited hereinafter as FWPCA, and individual sections will be cited to the sections of the Act rather than to the Code. Cross reference from the Act to the Code is easily made.

that this limited exception does not exempt, by implication or analogy, similar air quality programs of EPA from NEPA's requirements.[87] The Third Circuit, however, has stated in dictum that EPA does not have to prepare an impact statement for a compliance order under the Clean Air Act.[88] Both Senator Jackson, who authored NEPA, and Senator Muskie, who authored the Clean Air Act and the Federal Water Pollution Control Act, seem to feel that EPA's regulatory actions were not intended to be covered by NEPA, and that the decisions applying NEPA to EPA were "contrary in some respects to NEPA's legislative history."[89]

Having considered briefly the major problems which arise under NEPA, this article will now turn to the major regulatory statutes through which EPA and the state pollution control agencies protect our air and water and increasingly regulate the use of land while doing so. The Clean Air Act, the Federal Water Pollution Control Act Amendments of 1972, a typical state pollution control statute (the Mississippi Air and Water Pollution Control Act), and a sample coastal protection statute (the Mississippi Coastal Wetlands Law) will be examined. Following an analysis of these federal and state statutes is an examination of some recent EPA regulations which, while purporting to protect the environment, actually amount to state and federal control of land use.

B. The Clean Air Act

1. Introduction

Public Law 91-604, the Clean Air Amendments of 1970, became effective on December 31, 1970. This sweeping legislation gives EPA strong powers to deal with air pollution problems and with poorly drafted or enforced state programs. Although the Clean Air Act (as amended) purports to recognize that "control of air pollution . . . is the primary responsibility of States,"[90] the Act in fact gives the Administrator of EPA extraordinary powers to take over an "inadequate" state program and preempts state action outright in some areas.

2. Research and Grants

The Act favors uniform state regulations and cooperation between

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[87]Anaconda Co. v. Ruckelshaus, 3 ENVIRON. L. REP. 20024, 20031 (D. Colo. 1972).

[88]Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

[89]118 CONG. REC. 16886 (daily ed. Oct. 4, 1972); F. ANDERSON, *supra* note 65, at 111 (Muskie), 115 (Jackson).

[90]Clean Air Act § 101(a)(3). The Clean Air Act is codified at 42 U.S.C. §§ 1857 *et seq.* (1970), citations here are made to the Act itself and not to the Code. The transposition is easily made.

states and federal agencies.[91] The Administrator is authorized to conduct programs of research on the causes, effects, and control of air pollution; to make grants to or contract with others to do research; to develop practical control processes and devices; to gather and publish relevant information on air pollution effects and control (including basic chemical, physical, and biological data); and to provide training and fellowships for air pollution control.[92] When an air pollution problem is of substantial significance (*i.e.*, if it is subject to abatement under the Act), the Administrator may call a public conference, with notice to interested persons, and may render an advisory report to the appropriate interstate, state, and local authorities.[93] The Act makes $150 million available yearly for research on combustion of fuels and motor vehicle engine emissions.[94]

The Administrator may fund two-thirds of the cost of establishing and half the cost of maintaining local control programs. A program which includes two or more municipalities may be funded at 75 percent of its establishment costs and 60 percent of its maintenance costs. To be eligible, the local agency must have "substantial responsibilities" for air pollution control and must be capable of developing a comprehensive plan, including a system of alerts to avert episodes.[95]

Grants are based on the extent of the air pollution problem, the current expenditures and financial need of the local agency, and the area's population;[96] not over 10 percent of the total, however, can go to one state.[97] EPA funds interstate agencies at 100 percent for two years, then at 75 percent.[98]

3. Air Quality Criteria and National Ambient Air Standards

The Act directs each state to submit an implementation plan showing how the national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in the state.[99] EPA is charged with publishing by February 1971, and revising as needed, a list of air pollutants which have an adverse effect on public health or welfare. A year after publishing each list, EPA must publish technical criteria on the health and other effects[100] of each

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[91]Clean Air Act § 102.
[92]*Id.* §§ 103(a)-(b).
[93]*Id.* § 103(e).
[94]*Id.* § 104.
[95]*Id.* § 105(a).
[96]*Id.* § 105(b).
[97]*Id.* § 105(c).
[98]*Id.* § 106.
[99]*Id.* § 107.
[100]For example, economic effects such as damage to crops, houses, and livestock, and cleaning costs.

pollutant, control techniques, costs, and alternative processes.[101] The Administrator may set up an advisory committee of technical experts,[102] and the air quality criteria and control information is to be made publicly available and announced in the *Federal Register*.[103]

EPA was instructed to publish within 30 days after the Act became effective a list of proposed national primary and secondary ambient air quality standards for air pollutants for which criteria had been issued and thereafter to publish proposed standards for other air pollutants simultaneously with the issuance of criteria for them. After 90 days for written comments from interested persons, the primary and secondary standards are promulgated with any appropriate modifications.[104] Primary standards are those "requisite to protect the public health" (including a safety margin), and secondary standards (which are much more stringent) are those "requisite to protect the public welfare." The standards may be revised in the same manner as promulgated.[105]

4. Implementation Plans

The state implementation plan must be adopted after public hearings and must be submitted to EPA within 9 months after promulgation of the national primary air quality standard being implemented. The same hearings may be used for the plan implementing secondary standards.[106] EPA then has 4 months to approve or disapprove the plan. No plan can be approved unless it will result in the attainment of primary standards within 3 years and secondary standards within a "reasonable time." An acceptable plan must also include emission limitations; schedules for compliance; land-use and transportation controls (if necessary); provisions for air quality monitoring; procedures for review of siting of new sources subject to performance standards; provisions for intergovernmental cooperation; adequate provisions for personnel, funding, and enforcement authority; requirements for monitoring and reporting by source operators (which reports must be available to the public); provisions for emergency action to prevent air pollution episodes; provisions for periodic emission testing of motor vehicles; and provisions for revising the plan.[107]

EPA may allow a state an extra 18 months to submit a plan for

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[101]Clean Air Act §§ 108(a), (b)(1).

[102]*Id.* § 108(b)(2).

[103]*Id.* §§ 108(c), (d).

[104]*Id.* § 109(a). The standards, along with all the rest of EPA's regulations under the Clean Air Act and the FWPCA are codified in 40 C.F.R.

[105]*Id.* § 109(b).

[106]*Id.* § 110(a)(1).

[107]*Id.* § 110(a)(2).

implementing secondary standards,[108] and EPA may publish its own plan for a state whose plan is not acceptable or if no public hearing was held. EPA must first notify the state of the revisions needed, however, and allow the state 60 days to make them, and EPA must hold a public hearing in the state if there has been none.[109] Upon application by the governor of a state, EPA may allow an extra 2 years for implementing a primary standard if the needed technology is not available or if the state "justifiably" concludes that the standard cannot be met in 3 years, so long as the state is taking reasonable interim control measures.[110]

Individual sources (or classes) may get an extra year to comply if EPA agrees with the state's governor that, in spite of good faith efforts (including use of all available alternative operating procedures), the source (or class) is unable to comply because the necessary technology is not available *and* that the source's continued operation is necessary to national security or public health or welfare.[111] These determinations must be made on the record after notice to "interested persons" and opportunity for hearing, must be based upon a "fair evaluation of the entire record," and must state the findings and conclusions supporting the determination. Judicial review of the determination may be had by "any interested person"[112] who files a petition within 30 days with the United States Court of Appeals for the circuit containing that state.[113] EPA's fact findings will be sustained on review if based on a "fair evalu-

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[108]*Id.* § 110(b).

[109]*Id.* § 110(c).

[110]*Id.* § 110(e). The attainment of primary standards has been delayed for 2 years in order to allow use of fuels such as coal in some areas. The "energy crisis" interaction with environmental law is outside the scope of this article.

[111]*Id.* § 110(f)(1).

[112]Presumably, "any interested person" includes a member of the public living near the source. *See* Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), construing "aggreived parties" under section 313(b) of the Federal Power Act to include public groups concerned over the environmental effects of siting a pumped-storage hydroelectric project in their midst. While the question of the standing of public interest groups is outside the scope of this article, the basic rule now seems to be that concerned citizens living in the area have standing, but those who simply disagree with the agency action but are not personally harmed do not. Sierra Club v. Morton, 405 U.S. 727 (1972), held that the Sierra Club's intentional failure to allege that any of its members ever used the land in question precluded the Club's standing to obtain judicial review of the Interior Department's actions. When the pleading was changed to include this allegation, the Sierra Club was back in court. 57 SIERRA CLUB BULL., June 1972, at 17. United States v. SCRAP, 412 U.S. 669 (1973), appears to have eased the standing requirements for environmental litigants. *See* 40 BROOKLYN L. REV. 421 (1973). Citizen suits to protect the environment are being hotly debated at present, but the pros and cons are beyond this article. Some reference will be made to them later, however.

[113]A copy of the petition must be sent to EPA.

ation of the entire record"[114] at the hearing. Proceedings to review these determinations take precedence on the docket and are to be expedited in every way.[115]

5. Performance Standards for New Sources; Emission Standards

The Act requires EPA to publish by early 1971 a list of categories of stationary sources and to revise the list thereafter as needed. Within 120 days after inclusion of a category, EPA must publicly propose performance standards for new sources in the category. Performance standards are to reflect the "best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." The proposed performance standards, after EPA has considered comments thereon from "interested persons," are promulgated and become effective immediately.[116]

The Administrator may delegate his authority to implement and enforce performance standards to any state which submits an adequate plan, but EPA can still enforce the standards if the state fails to do so.[117] After a performance standard becomes effective, operation of a source in violation of such standard is unlawful.[118]

EPA is also required to publish by early 1971 and to revise as needed thereafter a list of "hazardous air pollutants" (those which "may . . . contribute to an increase in mortality . . . or serious . . . illness"). Within 180 days after inclusion in a list, EPA must publish proposed national emission standards for the hazardous air pollutant. After a public hearing, EPA promulgates the emission standards unless the Administrator finds that the pollutant "clearly is not a hazardous air pollutant." The standard established must provide an adequate safety margin, and becomes effective upon promulgation.[119]

There is a 90-day period for existing sources to comply with the emission standards, and the Administrator may grant a 2-year period to comply if the period is necessary to install controls and if public health is protected from "imminent endangerment" meanwhile. The President can exempt for 2 years a source needed for national security if he finds that control technology is not available, and this exemption

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[114]This seems to be nothing more than Justice Frankfurter's "substantial evidence" rule, as elucidated in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[115]Clean Air Act § 110(f)(2).

[116]*Id.* §§ 111(a),(b).

[117]*Id.* §§ 111(c),(d). The authority to enforce performance standards vis-a-vis federally owned sources cannot be delegated to the states.

[118]*Id.* § 111(e).

[119]*Id.* §§ 112(a), (d). "Hazardous air pollutants" include mercury, beryllium, and asbestos.

can be renewed indefinitely. The President must, however, report these exemptions to Congress. EPA may delegate its authority for implementing and enforcing emission standards to any state submitting an adequate implementation plan, but EPA can still enforce the emission standards itself if the state fails to do so.[120]

6. Enforcement

If EPA finds that any person is violating a requirement of an implementation plan, EPA notifies the violator and the state involved. After 30 days, EPA may issue an order or bring civil action to enforce compliance. If violations are so widespread as to indicate failure by the state to enforce the plan, EPA notifies the state of this fact. Thirty days after this notice, EPA may take over enforcement of the state's plan and may give public notice of this "period of federally assumed enforcement." EPA may then enforce the plan (as well as emission and performance standards) by issuing orders or by bringing a civil action in the United States District Court for the district where the source is located. An order is not effective until the alleged violator has had an opportunity to confer with the Administrator, and the court action cannot be brought until after 30 days' notice has been given to the alleged violator. Notice must also be given to the state control agency.[121]

One who knowingly violates a requirement of a federally enforced implementation plan, an EPA order, or a performance or emission standard is subject to a fine of $25,000 per day of violation and/or 1 year in jail. Repeat offenders are subject to $50,000 fine per day and/or 2 years in jail. A $10,000 fine and/or 6 months in jail awaits one who knowingly tampers with monitoring equipment or renders false information in a required report.[122]

EPA may require source operators to maintain records, install monitoring devices, take and test samples, make reports, and provide other reasonable information. Additionally, EPA personnel may enter the premises wherein a source or records are located and may inspect records and monitoring equipment and sample emissions.[123] EPA may delegate this authority to a state if its procedures are adequate, but EPA may still enter, inspect, and sample sources.[124] Records, reports, or information obtained are publicly available unless EPA decides that trade secrets would be divulged; emissions data must be made public.[125]

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[120] *Id.* §§ 112(c), (d).

[121] *Id.* §§ 113(a), (b).

[122] *Id.* § 113(c).

[123] *Id.* § 114(a).

[124] *Id.* § 114(b).

[125] *Id.* § 114(c). This is similar to the language of the APA (Administrative Procedure Act), as amended by the Freedom of Information Act. *See* 5 USC §§ 552(a), (b)(4) (1970).

7. Conferences; State Authority; Advisory Boards

When pollution of the air in one state is allegedly caused by sources in another state, EPA must, upon request from the affected state, call a conference of the appropriate interstate, state, and local control agencies. EPA may also call a conference on its own initiative after consulting with the affected agencies. EPA may call a conference to consider an air pollution source affecting only one state if that state requests the conference and EPA feels the problem is significant enough for federal jurisdiction. This conference procedure is, of course, a holdover from the old acts. Therefore, no conference may be called with respect to a pollutant for which a primary or secondary ambient air quality standard is in effect.[126] The conference is also available for international air pollution problems, in which case the foreign country participates in the same manner as a state would in an interstate case. The foreign country must give the United States similar rights in return in order to be able to participate in a conference.[127]

EPA must send a federal report on the matters to be discussed at the conference at least 30 days beforehand, and public notice of the conference must be given. Interested parties may present their views at the conference, and transcripts of the proceedings must be made available to a participant on request (at the participant's cost) as well as a summary of the conference and measures being taken, which are sent free to all participants.[128]

If, after the conference, effective progress is not being made, EPA may recommend remedial action. If none is taken within 6 months, EPA may call a public hearing before a board representing the interested states and federal agencies (but including at least a majority of members who are not EPA employees). The board hears evidence and makes recommendations to EPA, which sends these to the alleged polluters and to the states and agencies involved. If no action is then forthcoming, EPA may ask the Attorney General to go to federal district court to secure abatement. For the purely intrastate situation, the governor must request this action. The court has jurisdiction to enter such judgment "as the public interest and the equities of the case may require." Failure to submit the required information is punishable by a $100-per-day forfeiture. Orders or judgments under this conference, public hearing, and court action procedure do not affect the polluter's obligations under implementation plans or emission or performance standards.[129]

States retain their authority to adopt or enforce standards or limita-

[126]Clean Air Act § 115(b)(4).
[127]*Id.* § 115(c).
[128]*Id.* § 115(d).
[129]*Id.* §§ 115(e)-(k).

tions more stringent than EPA's requirements, at least with respect to stationary sources.[130]

The Act establishes the President's Air Quality Advisory Board within EPA, the board members to be appointed by the President. The Board advises EPA on policy questions, along with other advisory committees which the Administrator may establish and appoint.[131]

Federal facilities are subject to the Clean Air Act and to any state and local control requirements, but the President may exempt these facilities from control requirements for a year if the national interest so requires. He must report exemptions (and renewals) to Congress annually, together with his reasons for granting these.[132]

8. Emission Standards for Moving Sources

Title II of the Clean Air Act gives EPA authority to enforce emission standards for moving sources and preempts state standards for these sources unless the state has already adopted standards more stringent than the federal ones.[133] The states may inspect and test vehicle emissions, and EPA may grant two-thirds of the cost of doing so.[134] The Act itself sets 1975 as the deadline for a 90 percent reduction in carbon monoxide and hydrocarbon emissions, with a 90 percent reduction in nitrogen oxides to follow a year later.[135] The Administrator may delay these requirements for 1 year if he finds that they cannot be achieved despite good faith efforts, and he may set appropriate interim standards.[136] Since the bulk of Title II relates only to EPA and automobile manufacturers, and not to state activities, detailed discussion of it will be omitted. It will suffice here to say simply that EPA has strong powers and vast funding for research and development on the problems of ve-

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[130]*Id.* § 116.

[131]*Id.* § 117.

[132]*Id.* § 118.

[133]*Id.* § 209. In effect, this means only California, which had tough automotive emissions standards long before the Clean Air Act. States are still allowed to restrict the use of automobiles, and EPA has required such transportation controls for several large cities (*e.g.*, Los Angeles and Houston) where air quality standards cannot be met without them.

[134]*Id.* § 210.

[135]*Id.* § 202(b)(1). EPA announced in 1973 that, due to the discovery that its nitrogen-oxides testing method gave exaggerated results, implementation of the 90 percent reduction in NO_x emissions may not be necessary. The Commercial Appeal, June 8, 1973, at 13. After the United States Court of Appeals for the D.C. Circuit reversed its earilier refusal to grant a delay, International Harvestor Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973), EPA Administrator William Ruckelshaus granted one on April 11, 1973. While cars sold in California must still meet the original 1975-76 standards, the interim standards for the other 49 states are about half as tough. Ruckelshaus's approach apparently incensed both Detroit and the environmentalists, perhaps indicating that it was a good decision. *See* 4 ENVIRONMENTAL ACTION, Apr. 28, 1973, at 10.

[136]Clean Air Act § 202(b)(5). *See* note 135 *supra*.

hicular (automotive and aircraft) emissions. EPA cooperates with the Secretary of Transportation in this endeavor.

9. General; Emergency Powers; Citizen Suits; Review

Title III of the Clean Air Act contains various useful provisions. EPA is there authorized to go to court immediately if state or local authorities have not acted to restrain pollution which presents an "imminent and substantial endangerment to the health of persons."[137]

Upon 60 days' notice to EPA, the state, and the alleged violator, citizens' suits can be brought against anyone allegedly violating a standard, limitation, or order under the Clean Air Act or against the Administrator if he fails to perform a mandatory duty. The citizen's suit must be brought in the United States District Court for the district where the source is located, and EPA may intervene as of right. The court may award the costs of litigation, including attorney and expert witness fees, if the court feels this is appropriate. If a state or EPA is diligently prosecuting a civil action against the violator, the citizen may not sue but may intervene as of right.[138] The Attorney General represents EPA in civil actions, but EPA may use other attorneys if the Attorney General does not notify EPA that he will appear.[139] No federal agency may contract with a person convicted of knowingly violating an implementation plan, standard, or order (*i.e.*, items manufactured at the offending facility cannot be bought by a federal agency until the violation has ended). The President may grant exemptions where paramount national interests require, but he must notify Congress.[140]

EPA may subpoena witnesses and information but must keep trade secrets confidential. Failure to comply with a subpoena is punishable as contempt.[141] Review of a national ambient air quality standard, emission standard, performance standard, or vehicle emission standard may be had only in the United States Court of Appeals for the District of Columbia Circuit. Review of EPA actions on an implementation plan can be had only in the court of appeals "for the appropriate circuit."[142] Petition for review must be filed within 30 days, and no review is available during judicial enforcement proceedings if the action in question was subject to review earlier. On review, a party may apply for leave to adduce additional evidence, and the court may remand to EPA to hear

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[137]Clean Air Act § 303.

[138]*Id.* §§ 304(b)-(d).

[139]*Id.* § 305.

[140]*Id.* §§ 306(a),(d).

[141]*Id.* § 307(a).

[142]*Id.* § 307(b). The "appropriate circuit" is the circuit containing the state whose implementation plan is involved.

the new evidence, whereupon the Administrator may modify his findings.[143]

There is mandatory licensing of patent rights when the Attorney General agrees with EPA that this is necessary for compliance.[144] EPA must review and comment on the environmental impact of new legislation, federal projects subject to NEPA, and regulations of other agencies. EPA's recommendations are referred to the Council on Environmental Quality (CEQ) for ultimate decision.[145] EPA, in cooperation with the states, is required to study the economic impact of air quality standards and the need for trained personnel, and to report its findings annually to Congress.[146] The Administrator is required to report annually on all measures taken to implement the letter and spirit of the Act.[147] Laborers working on projects funded under the Act must be paid at least the prevailing rates in the area for that kind of work, as determined by the Secretary of Labor.[148] There are other provisions in the general section of the Act that are too minor to be discussed in this summary.

C. The Federal Water Pollution Control Act

1. Introduction

In 1972 the whole philosophy of federal water pollution law was changed. Before the passage of Pub. L. No. 92-500, the Federal Water Pollution Control Act Amendments of 1972, federal pollution control efforts centered on defining the most logical use for a river (*e.g.*, recreation, drinking water supply, navigation, industry, agriculture, or other uses) and then limiting discharges into it so as to take full advantage of the stream's natural assimilative capacity.[149] The new law draws heavily on the terminology and procedures of the Clean Air Act by requiring that by 1977 dischargers utilize the "best practicable technology" (as defined by EPA) to limit their waste discharges, regardless of

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[143]*Id.* §§ 307(b)(2), (c).

[144]*Id.* § 308.

[145]*Id.* § 309. Of course, CEQ's authority is only advisory; NEPA has not given it jurisdiction to stop any projects of other agencies. *See* text accompanying note 70 *supra*.

[146]*Id.* § 312.

[147]*Id.* § 313.

[148]*Id.* § 314.

[149]For example, a river might be determined to be useful only for industry and navigation. Thus a "water quality standard" of 4 PPM (parts per million) of dissolved oxygen would be set for the river, and the biochemical oxygen demand (BOD) of each discharge into the river would have to be reduced enough so that at least 4 PPM of dissolved oxygen would remain in the river after the residual waste had been biodegraded. In practice, "primary" treatment (removal of suspended solids) and "secondary" treatment (removal of about 85 percent of BOD_5) were usually required to meet the standard. Defining the equivalent of secondary treatment for some industrial wastes was quite difficult.

the existing assimilative and dilution capacity of the stream. Where the stream is heavily industrialized, the discharge limitations may be even stricter. After 1983, "best available technology" must be utilized, with 1985 set as the deadline for a national goal of no waste discharges at all. Whether this "zero discharge" goal can be feasibly achieved is at least doubtful—but it is a good target to work toward.

2. Research; Research-Related Programs

According to the Act, the national goal is the elimination, by 1985, of all discharges of pollutants into navigable waters, with an interim (1983) goal of a water quality which will provide for recreation and for protection and propagation of fish, shellfish, and wildlife. Other goals are areawide waste treatment planning, federal financial assistance to control agencies, research and development of necessary technology, and prohibition of toxic discharges.[150]

The Act recites that states have primary responsibility for water pollution control,[151] that the Administrator of EPA administers the Act,[152] that the Secretary of State is the man for international water pollution control agreements,[153] and that paperwork and bureaucratic delays should be minimized.[154] Significantly, the Act provides that public participation in setting and enforcing standards and limitations should be encouraged and provided for. EPA is directed to develop minimum guidelines for such public participation at both federal and state levels.[155]

EPA must also develop a comprehensive program for reducing water pollution, including setting the value of water storage for stream-flow regulation for use in cost-benefit analyses of TVA, Interior, FPC,

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[150]FWPCA § 101(a).

[151]*Id.* § 101(b). A comparison of the powers given to the states with those given to EPA makes this section a little hard to take literally.

[152]*Id.* § 101(d).

[153]*Id.* § 101(c).

[154]*Id.* § 101(f). An example of the absurdities which flow from the bureaucrat's love of forms and red tape is the now defunct discharge permit program implemented in 1970 by the Corps of Engineers. The long, complicated forms the Corps devised took one of the authors (Holmes) 4 months to complete for one plant (admittedly a large plant). The sampling, laboratory analyses, and paperwork on the permit applications from this plant ultimately cost over $25,000 and covered more than 1,000 pages of data, calculations, and explanations. By the time the Corps got around to reviewing these applications some 9 months later, about 90 percent of the information was obsolete due to various process modifications and pollution control installations carried out during the interim. One must wonder how many more such modifications and installations could have been made if there had not been such occupation with the forms. See note 41 *supra* for a discussion of the fate of the Corps' discharge permit program.

[155]FWPCA § 101(e). EPA proposed such guidelines in the *Federal Register* on February 23, 1973. 40 C.F.R. pt. 105 (1973).

and Corps of Engineers projects.[156] Streamflow regulation, however, cannot be substituted for adequate treatment of all discharges. EPA is allowed to grant planning agencies 50 percent of the costs involved in developing basin-wide control plans.[157]

Interstate cooperation and uniform state laws for water pollution control are encouraged, and the consent of Congress is given for interstate compacts for such purposes.[158] A broad range of research and training activities designed to develop the technology necessary to carry out the goals of the Act is mandated.[159] Included are research fellowships, technical assistance to states and the public, manpower forecasting and training, demonstration of practical treatment processes, and a number of other items, all funded from an annual authorization exceeding $100 million. Research and development and demonstration projects are 75 percent federally funded but must be approved by the appropriate state agency.[160]

Grants are provided to states having adequate monitoring and enforcement ability if the state agency files a report of its activities by July 1 of each year.[161] EPA is directed to cooperate with the Appalachian Regional Commission in developing and demonstrating methods of controlling pollution from mine drainage and restoring mined land to use.[162] Federal funding of 75 percent is allowed for cleaning up the Great Lakes, and the awesome task of rehabilitating Lake Erie is given to the Corps of Engineers.[163] The remainder of Title I deals with training grants,[164] scholarships for treatment plant operators,[165] and various special projects.[166]

3. Grants for Construction of Treatment Works

The 1972 Amendments raise the federal share of the cost of building

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[156]FWPCA § 102.

[157]*Id.*

[158]*Id.* § 103. Mississippi belongs to the Tennessee River Basin Water Pollution Control Commission, which was ratified in 1949.

[159]*Id.* § 104.

[160]*Id.* § 105.

[161]*Id.* § 106.

[162]*Id.* § 107.

[163]*Id.* § 108. This section also mandates the investigation of alternative wastewater disposal techniques, including land disposal, whereby the nutrient-laden wastewater is sprayed onto farmland to fertilize and irrigate crops.

[164]*Id.* § 110.

[165]*Id.* § 111.

[166]For example, the Alaska village demonstration projects (§ 113), the Lake Tahoe study (§ 114), and studies on removal of in-place toxic pollutants (§ 115) (a serious problem in areas where heavy metals and other chemicals have been long accumulating on stream and lake beds).

wastewater treatment works to 75 percent.[167] No grant, however, will be made unless the applicant submits the plans for EPA approval[168] and has adequate personnel and funds to operate. Also, the treatment plant must be part of an areawide plan (if there is such a plan), conform to the state plan, be certified by the state agency, and have adequate capacity. Further, there must be no exclusionary specifications in the plans, and there must be a system of user charges in line with EPA guidelines.[169] Areawide waste treatment management plans are completely funded by EPA.[170]

Title II calls for application of the best practicable technology in treatment works, areawide treatment, recycling, integration with solid waste disposal, use of waste heat, open spaces, design of present works so as to allow future improvements,[171] basin planning,[172] and annual surveys of water quality.[173] Finally, $18 billion is authorized for new construction and reimbursement to states for projects already begun.[174]

4. Standards; Enforcement

Title III begins by declaring that discharges not in compliance with the Act are unlawful.[175] The rest of Title III delineates what constitutes compliance with federal and state law and regulations and what enforcement mechanisms are available.

By July 1, 1977, dischargers must comply with effluent limitations requiring application of the "best practicable control technology currently available," or with applicable pretreatment requirements if the discharge is into a public sewer. Publicly owned treatment plants must achieve secondary treatment[176] by the same date. If achievement of

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[167]FWPCA § 202.

[168]*Id.* § 203.

[169]*Id.* § 204. The EPA guidelines are set high enough to allow repayment of the federal share by industrial users.

[170]*Id.* § 208.

[171]*Id.* § 201.

[172]*Id.* § 209.

[173]*Id.* § 210.

[174]President Nixon's proposed bill only authorized $6 billion. The President vetoed the $18 billion bill for economic reasons. After the bill was passed over his veto, he instructed EPA not to spend the extra $12 billion. Many suits were filed challenging this move, with plaintiffs including everyone from Ralph Nader to the City of New York. *See* 4 ENVIRONMENTAL ACTION, Oct. 28, 1972, at 5. At least one judge has held that the money was "illegally" withheld. *See* City of New York v. EPA, *noted in* 5 ENVIRONMENTAL ACTION, May 26, 1973, at 6.

[175]FWPCA § 301.

[176]Secondary treatment includes removal of suspended solids (traditionally by a clarifier or settling tank) plus the removal of 85 percent of the BOD_5 of the incoming wastewater (usually by aeration, trickling filter, or activated sludge process). Secondary treatment is a term used by civil-sanitary engineers, and the recent influx of chemical engineers into

applicable water quality standards requires even stricter limitations, these too must be met. By July 1, 1983, publicly owned treatment works must comply with the then applicable standards, and industrial dischargers must use the "best available technology economically achievable" (including total recycling if EPA finds this to be feasible). EPA may modify the requirements for a source if the Administrator finds that the "best available" standard exceeds the owner's economic capability, provided the modified requirement calls for the best control the owner can afford and represents progress toward zero discharge. Effluent limitations must be reviewed at least once every 5 years, and they must apply to all point sources in the class. Finally, the discharge of chemical or biological warfare agents or high-level radioactive wastes into navigable waters is outlawed.[177]

If water quality standards require effluent limitations even stricter than "best practicable" or "best available," EPA may, after 90 days notice and a public hearing, set stricter limitations unless the source owner can show that there is no reasonable relation between costs and benefits from the stricter limitations.[178]

Existing interstate water quality standards are adopted by the Act, subject to change by EPA, and the states must submit their water quality standards for intrastate waters. EPA can modify the intrastate water quality standards or publish new ones of its own if the state standards are inadequate. State water quality standards are reviewed by a public hearing at least once every 3 years, and the new standards are then submitted to EPA for approval or modification. EPA can propose and, after 90 days, promulgate new standards whenever necessary. The state must include a water use inventory and criteria for its standards and must identify and set priorities for areas where existing effluent standards will not achieve the water quality standard. The state must also identify areas where existing thermal pollution controls do not assure "protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife" and must estimate the effluent limitations needed to achieve the water quality standards and the protection of waterlife. EPA has 30 days after submission to approve or modify these identifications and maximum allowable loads. The state is also

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the environmental field should soon obsolete the phrase along with the 19th century technology it implies. A major bottleneck to implementation of such promising new processes as activated carbon absorption, ultrafiltration, reverse osmosis, multiple effect evaporation, oxygenation (Union Carbide's "Unox"), and ozonation has been the unfamiliarity of old-line sanitary engineers with these new techniques. To a much lesser extent, over-conservatism vis-a-vis desire for the implementation of new technology for water pollution control also exists in industry.

[177]FWPCA § 301.

[178]*Id.* § 302.

required to estimate the maximum thermal load consistent with the "balanced indigenous population of shellfish, fish, and wildlife" for the state's other navigable waters. Finally, the state must have an approved continuous planning process, including effluent limitations, schedules of compliance, areawide waste management plans, total maximum daily load of pollutants, procedures for revision, adequate authority for intergovernmental cooperation, implementation of new water quality standards, controls on disposal of residual waste from water treatment plants, and an inventory of needs for new wastewater treatment works.[179]

While the above is aimed primarily at the states' role, EPA's duties in publishing information and guidelines to direct the states' efforts in adopting implementation plans is also set forth in the Act.[180] EPA publishes water quality criteria in the *Federal Register* along with guidelines for effluent limitations (including cost factors, energy requirements, "best practicable" and "best achievable" technology), information on non-point sources (*e.g.*, agricultural, construction, mining, well disposal, and changes due to dams), pretreatment guidelines, and test procedures for analyzing pollutants. EPA also publishes uniform forms for monitoring, reporting, and enforcement. Additionally, the EPA guidelines must set minimum funding, procedural, and personnel requirements for state programs, including a requirement that

> no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit.[181]

In the same section, EPA is allowed to transfer funds to the Army and Departments of Agriculture and Interior to carry out programs.[182]

An EPA report is required by 1974 showing existing water quality of all navigable waters and the contiguous zone; an inventory of all point sources of discharges (qualitative and quantitative); and an identification of waters that already have water quality adequate to provide for protection and propagation of a balanced population of fish and wildlife and which are adequate for recreation, and waters that can attain this

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[179]*Id.* § 303.

[180]*Id.* § 304.

[181]*Id.* § 304(h). EPA published these guidelines on December 22, 1972, in the *Federal Register*, 40 C.F.R. 779 pt. 124 (1973). EPA interpreted the conflict of interest provision in the Act so as to allow up to 10 percent of the income of board members to be from industrial sources or other permit holders or applicants. The EPA guidelines exempt income from mutual funds which own shares in holders or applicants, and pension-type income for members over 60 years old (up.to 50 percent of their total income).

[182]FWPCA § 304.

quality by 1977, 1983, or any later date. The states must report to EPA by January 1, 1975, and annually thereafter, on the water quality of their navigable waters; progress in eliminating pollution; estimate of the costs, benefits, and time requirements of carrying out the Act; and a description of non-point sources. EPA must then report on all this to Congress by October 1, 1975.[183]

EPA must publish a list of categories of sources and then propose, within a year, federal standards of performance for new sources within the categories. Standards of performance require the best available demonstrated control technology and operating methods, considering cost and energy requirements. After public comment, EPA promulgates the standards and may revise them later in the same manner. EPA may delegate authority to enforce performance standards to a state having adequate procedures, and new sources complying with the then applicable standards are not subject to more stringent standards for a 10-year period.[184]

A similar procedure is outlined for setting effluent standards for toxic pollutants and pretreatment standards for discharges into public sewers.[185] An EPA-proposed toxic pollutant standard must be promulgated unless, after the required public hearing, EPA finds that a modification is justified by a preponderance of the evidence in the record. The toxic pollutant standards also apply to dredging, but EPA must consult the Secretary of the Army on this. Pretreatment standards for discharges from new sources into public sewers must be published at the same time as the applicable performance standards but may become effective any time up to 3 years after promulgation for existing sources.[186]

EPA is given authority to require recordkeeping, reports, monitoring, sampling, and testing by source operators. Also, EPA personnel may enter source premises to inspect records, take samples, and perform tests. EPA may delegate this authority to a state if the state's procedure is adequate. Importantly, any records, reports, or information obtained must be available to the public unless EPA decides that trade secrets would be divulged; effluent data must be made public in any case.[187]

EPA can act upon a violation of a state permit if the state fails to do so within 30 days after notice, and EPA can take over the state's

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[183]*Id.* § 305.

[184]*Id.* § 306.

[185]*Id.* § 307. Pretreatment of industrial discharges is sometimes necessary either to prevent interference with normal treatment works operation (*e.g.*, poisoning or inhibiting bacterial actions) or to prevent non-biodegradable constituents from passing through unaffected into the stream.

[186]*Id.*

[187]*Id.* § 308.

program entirely after giving public notice if there are widespread failures. EPA enforcement orders are not effective until the alleged violator has consulted with EPA, and notice must be given for civil actions to enforce compliance. Willful violations and false reports are punishable by a fine of $25,000 per day and/or 1 year in jail (double for repeat offenses) and a $10,000 fine and/or 6 months in jail, respectively. Alternatively, EPA can have a civil penalty of $10,000 per day assessed for violations, with a state liable for judgments against its municipalities.[188]

The procedure for abating international pollution is set out in the Act. This procedure includes notice in the *Federal Register,* a conference of affected parties, an EPA report to the parties, and appropriate penalties for noncompliance.[189] The procedure is similar to the Clean Air Act procedure for abating international air pollution.

Liabilities are delineated for willfully or negligently discharging oil or hazardous substances into navigable waters and the waters of the contiguous zone or along shorelines. EPA designates which substances are hazardous, but the President determines how much oil or hazardous substance must be discharged to harm public health or welfare. EPA sets the amount of the discharger's liability based on the amount spilled and the nature of the material (toxicity, biodegradability, dispersability). Maximum penalty for willful discharges from onshore facilities after 1974 is $500,000; from vessels, $5 million. Nonwillful discharges incur only $50,000 liability. If the spill can be cleaned up, the spiller must do so or reimburse the government for cleanup costs (up to $8 million for an onshore facility; $14 million for an offshore facility or a vessel).[190] Dischargers face a $10,000 fine and/or 1 year in jail if they fail to notify the Coast Guard immediately of any violations, but information given cannot be used in a criminal action against the violator. No liability is assessed if the spill was due solely to an act of God, war, or negligence of a third party, including the United States. The United States attorney, acting through the appropriate district court, can end a discharge threat by having the vessel destroyed if necessary. A National Contingency Plan is called for by the Act, and enforcement authority over small spills is given to the Coast Guard. These provisions do not affect a spiller's liability to other persons.[191]

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[188]*Id.* § 309. These penalties and fines are identical to those for violations of the Clean Air Act.

[189]*Id.* § 310.

[190]FWPCA § 311. The Supreme Court recently decided that states can go beyond this and impose unlimited strict liability for cleanup costs and damages to private property from offshore spills. The Court rejected the oil carriers' argument that federal maritime jurisdiction prevents the State of Florida from doing this by preempting the field. *See* Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973).

[191]FWPCA § 311.

EPA and the Coast Guard set performance standards for marine sanitation devices, but the Secretary of Defense has power to exempt federal vessels for national security reasons.[192] The President can exempt federal property from the otherwise applicable requirements of the Act, but his reasons must be other than mere lack of funds.[193] The states are directed to submit plans for restoring eutrophic lakes, and $300 million over 3 years is authorized for doing this.

A National Study Commission is charged with reporting to Congress within 3 years on whether the 1983 goals can be met and what the total cost will be.[194] An EPA study of the feasibility of a pollution abatement trust fund is called for.[195] EPA may loosen restrictions on thermal discharges if the source owner can show that a less stringent limitation is required for protecting the balanced indigenous fish and wildlife population. A complying thermal source gets a 10-year exemption from new restrictions. Location and operation of water intakes must minimize adverse environmental impact.[196] Regulation of discharges from aquaculture projects is provided for in the Act.[197]

5. Permits; Licenses

An applicant for a federal license or permit must get state certification, and, if the discharge will affect other states and they complain, EPA holds a hearing before issuing or denying the license or permit. Violation of a federal permit causes it to be revoked upon conviction.[198]

It is through the National Pollutant Discharge Elimination System (NPDES) that all the standards and regulations of the Act's other provisions are put into effect. EPA issues a permit, after a public hearing, to a source owner allowing the source to discharge only the amount specified in the permit and under such conditions as the permit requires (including testing and reporting requirements). NPDES replaces the Refuse Act permit program, and Refuse Act permits and applications are deemed to be NPDES permits and applications. EPA can delegate permit-granting authority to a state or to an interstate compact when either has adequate authority and ability to carry out the program.[199]

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[192]*Id.* § 312.

[193]*Id.* § 313.

[194]*Id.* § 315. An idea of the enormity of that cost can be gleaned from the fact that the Study Commission was given $15 million to spend in ascertaining it.

[195]*Id.* § 317.

[196]*Id.* § 316.

[197]*Id.* § 317.

[198]*Id.* § 401.

[199]*Id.* § 402. EPA and the State Air and Water Pollution Control Commission held a joint public hearing in Jackson in March 1974, to consider delegation of NPDES authority to the Commission (actually, to the new Permit Board within the Commission). *See* text accompanying note 234 *infra*. Mississippi's application for NPDES was approved by EPA

Once the delegation is made, EPA still retains a veto power over individual permits but must hold a public hearing before withdrawing approval from the state program. Copies of permit applications and permits must be given to EPA by the state agency, and this information must also be available to the public.[200]

Ocean discharges without an EPA permit are prohibited. A permit must have restrictions in it providing for protection of alternate uses of the ocean and shoreline.[201] The Corps of Engineers has the job of regulating, with public notice and hearing, disposal of dredge spoils and fill materials, subject to EPA veto power over the site of the spoil disposal area.[202] An EPA (or state, if EPA has delegated authority) permit to dispose of sewage sludge is required if navigable waters will be affected thereby.[203]

6. General; Emergency Powers; Citizen Suits

Grant recipients must keep sufficient records and allow EPA inspection and auditing. Also, "outstanding achievement" in pollution control by an industrial firm is to be formally recognized.[204] "Pollutant," within the meaning of the Act, does not include saltwater reinjected into oil wells. The Act also defines "toxic pollutant" and other terms used therein.[205] The Water Pollution Control Advisory Board is composed of government and industry officials and representatives of conservation groups.[206] EPA has emergency power to go directly to court to end endangerment of life, health, or economic welfare.[207]

A citizen can sue anyone allegedly violating a standard or order and can sue the Administrator if he fails to perform a nondiscretionary duty. The suit cannot be brought if EPA or the state is prosecuting an action against the violator. In any event, 60 days' notice must be given to EPA, the state, and the alleged violator. To have standing under this provision, a citizen must have an "interest which . . . may be adversely affected."[208] This is probably the same standard for standing as the Supreme Court's requirement of injury in fact plus an interest "argua-

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effective May 1, 1974. Mississippi is the first state in EPA's Region IV to receive approval for a NPDES permit program. Telephone conversation with John Smith, Deputy Director of the Mississippi Air and Water Pollution Control Commission, August 2, 1974.

[200] FWPCA § 402.

[201] *Id.* § 403.

[202] *Id.* § 404.

[203] *Id.* § 405.

[204] *Id.* § 501.

[205] *Id.* § 502.

[206] *Id.* § 503.

[207] *Id.* § 504.

[208] *Id.* § 505.

bly within" the protection of the relevant statute.[209] Further, the suit must be brought in the federal district court for the district where the source is located, and EPA may intervene as of right. The court may award the costs of the litigation (including attorney's and expert witnesses' fees) if this is deemed appropriate.[210] EPA is to be represented by the Attorney General but may use its own lawyers or other counsel if the Attorney General does not agree to appear.[211]

An employee cannot be fired for testifying about violations, and a provision for a hearing under the purview of the Labor Department enforces this. EPA is to study the effects of effluent limitations on employment, and an employee discharged or laid off allegedly because of an order or limitation can get EPA to have a public hearing on the matter.[212] Other federal agencies are prohibited from buying from a plant convicted of negligent or willful violations until the conditions giving rise to the violations are corrected, unless the President exempts the plant for reasons of paramount national interest.[213]

Subpoenas of information and records, which become public unless a trade secret is involved, and judicial review of EPA actions on motion of any "interested person" are provided for. Review of a regulation, however, may not be had in enforcement proceedings if the regulation could have been reviewed earlier. The court may grant leave to a party to adduce new evidence and may remand to EPA to hear it if the evidence was unavoidably not available below.[214]

The states are allowed to set and enforce standards and limitations stricter than the federal ones.[215] Wage rates for projects funded under the Act are to be equal to the area rates for that kind of work.[216] An Administrator-appointed Effluent Standards and Water Quality Information Advisory Committee is provided for and is made up of paid technical experts.[217] The Administrator is directed to report to Congress

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[209]Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). It was held in Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), that aesthetic, conservational, and recreational interests may be enough to confer standing, but Sierra Club v. Morton, 405 U.S. 727 (1972), requires that the plaintiffs allege that they will be personally affected by the action in question. United States v. SCRAP, 412 U.S. 669 (1973) allowed standing to an environmental group alleging an injury no different from that suffered by the population as a whole. *See* note 112 *supra*.

[210]FWPCA § 505.

[211]*Id.* § 506.

[212]*Id.* § 507.

[213]*Id.* § 508.

[214]*Id.* § 509.

[215]*Id.* § 510.

[216]*Id.* § 513.

[217]*Id.* § 515.

annually,[218] and various sections of the Act provide for oversight studies,[219] international trade studies,[220] and international agreements.[221] Finally, there are provisions dealing with small business loans for pollution control projects,[222] a Presidential report on the feasibility of an environmental court,[223] a policies and goals study,[224] an efficiency study,[225] and a Federal Environmental Financing Authority to purchase bonds issued to finance public pollution control projects.[226]

IV. State Pollution Control and State Coastal Protection Acts

A. The Mississippi Air and Water Pollution Control Act

The Mississippi Air and Water Pollution Control Act of 1966,[227] as amended in 1968, 1971, 1972 and 1973, is a comprehensive statute designed to "conserve the air and waters of the State and to protect, maintain and improve the quality thereof for public use, for the propagation of wildlife, fish, and aquatic life, and for . . . other . . . beneficial uses," and to "maintain such a reasonable degree of quality of the air resources of the state to protect the health, general welfare and physical property of the people, and to provide that no waste be discharged . . . without first receiving the necessary treatment . . . ."[228] The Act begins to do this by declaring air and water pollution to be a public menace and a nuisance and calling for cooperation with other states and the federal government in solving these problems.[229]

Definitions are provided for terms such as pollution, wastes, sewerage system, treatment works, disposal system, waters of the state, air contaminant, air pollution, air contamination, air contamination source, air-cleaning device, and area of the state.[230]

The Act creates the Mississippi Air and Water Pollution Control Commission (the "Commission"), to be composed of the Director of the Division of Sanitary Engineering of the State Board of Health; the Director of the State Game and Fish Commission; the Water Engineer of the State Board of Water Commissioners; the Supervisor of the State

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[218] *Id.* § 516.
[219] *Id.* § 5.
[220] *Id.* § 6.
[221] *Id.* § 7.
[222] *Id.* § 8.
[223] *Id.* § 9.
[224] *Id.* § 10.
[225] *Id.* § 11.
[226] *Id.* § 12.
[227] Miss. Code Ann. §§ 49-17-1 to -43 (1972), as amended, (Supp. 1973).
[228] *Id.* § 49-17-3.
[229] *Id.*
[230] *Id.* § 49-17-5.

Oil and Gas Board; the Executive Secretary of the Mississippi Marine Conservation Commission; one member, a farmer, appointed by the Commissioner of Agriculture and Commerce with advice and consent of the Senate; and five members appointed by the Governor with advice and consent of the Senate. Of the 5 appointed by the Governor, 1 must be an official of a municipality, 1 must be actively engaged in farming, 1 must be picked from a list of 10 submitted by the Mississippi Wildlife Federation, and 2 "shall represent industry but shall not come from the same basic industry."[231]

The last requirement conflicted directly with the Federal Water Pollution Control Act[232] and EPA's guidelines thereunder,[233] so it was amended in 1973 to provide for a permit board consisting of only the first five members of the Commission in the above list.[234] Under the federal law and guidelines, no permit-granting board may have as a member a person who receives, or has received during the past 2 years, over 10 percent of his income from a permit holder or applicant.[235]

Associate, nonvoting members of the Commission include the Director of the Agricultural and Industrial Board, the State Geologist, and the Director of State Parks. State officials may designate representatives to serve on the Commission in their stead, and the non-State employees who serve on the Commission receive a $22.50 per diem al-

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[231]*Id.* § 49-17-7.

[232]FWPCA § 304(h)(d).

[233]40 C.F.R. 124 (1973).

[234]MISS. CODE ANN. § 49-17-9 (1972). Many states have conflict of interest provisions for state pollution control boards. For example, Alabama's new Air Pollution Control Commission may not have as a member "an employee, officer, or significant stockholder of any corporation which holds a permit from the air pollution control division." The policy reasons behind such restrictions are obvious and are discussed in A CITIZEN'S GUIDE TO CLEAN AIR at 77. The booklet was written in 1972 for EPA by the Conservation Foundation. Additional discussion of Section 304(h)(D) of the FWPCA, along with an attack on EPA's interpretation of it, is found in the Natural Resource Defense Council's WATER POLLUTION CONTROL HANDBOOK: A CITIZEN'S GUIDE TO THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 21. The booklet was written for the NRDC's Project on Clean Water by Gus Speth and Barbara Reid. A good comparative work on state boards is Elizabeth Haskell's MANAGING THE ENVIRONMENT: NINE STATES LOOK FOR NEW ANSWERS (1971).

The current Mississippi Commissioners are: Ray Tribble, of Money, Chairman; James W. Carraway, of Bassfield, Vice-Chairman; Joe D. Brown, of the Board of Health; W. J. Demoran, of the Marine Conservation Commission; Charles W. Else, of Yazoo City; Barry O. Freeman, of the Game and Fish Commission; W.E. Gupton, of Jackson; Quincy R. Hodges, of the Oil and Gas Board; Hermit A. Jones, of Canton; and Jack Pepper of the Board of Water Commissioners. Associate members are: Dr. John M. King, of the State Park System; Paul Burt, of the A. & I. Board; and W. H. Moore, of the Geological Survey. Letter from Glen Wood, Jr. to Gurthrie T. Abbott, April 26, 1974.

[235]FWPCA § 304.

lowance plus expenses.[236]

The Commission meets in Jackson at least once a month, with special meetings and open hearings as needed. The executive director can call special meetings, as can the chairman or vice-chairman if two members so request. A majority of the members constitute a quorum.[237]

The executive director[238] is appointed by the Commission and has administrative authority to supervise the air and water pollution control programs adopted by the Commission. The executive director has whatever authority the Commission delegates to him except that promulgation of standards, rules, and regulations; revocation of permits; and issuance, modification, or revocation of orders cannot be delegated by the Commission. The Commission may employ personnel necessary to carry out the Act, and the attorney general, or an assistant, advises and represents the Commission. District and county attorneys are instructed to cooperate with the attorney general in actions of the Commission.[239]

The Commission is designated as the State's pollution control agency for purposes of federal laws and programs, and the Commission is authorized to receive funds from all sources. The disbursement of funds, however, is subject to the approval of the Commission on Budget and Accounting.[240]

The Act lists the powers and duties of the Commission and directs the Marine Conservation Commission to cooperate with the Air and Water Pollution Control Commission with respect to saltwater pollution problems. Powers and duties of the Commission include supervising and enforcing of the Act and regulations under it; developing of comprehensive pollution prevention and control programs; advising, consulting, and cooperating with State and federal agencies, industries, municipal-

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[236]Miss. Code Ann. §§ 49-17-7(b)-(d) (Supp. 1973). This was only $20 per diem until raised by the 1972 amendments to the Act.

[237]*Id.* § 49-17-11. Formerly, the Commission met quarterly.

[238]The executive director is currently Glen Wood, Jr.

[239]Miss. Code Ann. § 49-17-13 (Supp. 1973). Formerly, the executive director was called the executive secretary. The Commission had approximately 85 employees as of April 26, 1974. Of these, 34 are in air, 38 are in water, and 11 support both programs (computer programming, accounting, public information, and administrative positions). There are three regional offices: in Oxford, in Jackson, and on the Coast, and 35 of the Commission's staff personnel work in the regional offices. Letter from Glen Wood, Jr. to Guthrie T. Abbott, April 26, 1974.

For one of the smallest and most underfunded state pollution control agencies in EPA Region IV (which includes Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee) the Mississippi Air and Water Pollution Control Commission does an "excellent" job. Interview with Frank Reed III, Assistant for Congressional and Inter-Governmental Affairs, U.S. Environmental Protection Agency, Region IV, in Atlanta, Georgia, February 14, 1974.

[240]Miss. Code Ann. § 49-17-13(3) (Supp. 1973).

ities, and affected groups; administering grant programs and other funds; participating in or encouraging research and demonstration projects and studies on pollution and its control; requiring repayment of loans; collecting and disseminating of information on pollution and its control; adopting or modifying air and water quality standards; adopting, modifying, and promulgating rules and regulations (after due notice and hearing); issuing, modifying, or revoking orders; conducting hearings and subpoenaeing witnesses and evidence; requiring submission of plans and specifications for disposal systems or air cleaning devices in connection with the issuance of permits; issuing installation, operation, or discharge permits under appropriate conditions; requiring proper maintenance and operation of disposal systems and air cleaning devices, including monitoring and reporting; exercising incidental powers; and delegating duties and powers to agency members. The Commission has no jurisdiction over inplant environmental conditions.[241]

Confidential processes, devices, or manufacturing methods must be kept confidential, with civil and criminal liability provided for violators of this provision.[242]

It is unlawful to pollute the air or to place substances in a location where they are likely to cause air pollution or to discharge substances into the air so as to reduce air quality below the standards established by the Commission. Such air pollution or discharge is declared a public nuisance. Also, building or operating a source of air contaminants without a Commission permit is banned. Such a permit is revocable by the Commission upon 30 days' notice and a chance for a hearing. The Commission may require submission of plans and compliance schedules in permit applications and may deny any application subject to the hearing requirement. Existing sources continue to operate, however, pending the decision on the application. The decision must be made within 90 days.[243]

The Act does not outlaw violations of the conditions of the permit once it is issued. The Commission's *Permit Regulations*[244] spell out the information required in a permit application and provide that a permit may be suspended or revoked for "willful or continued violation of rules and regulations," for refusing to comply with orders during an episode, or for ceasing operation for 18 months.[245] Nowhere is the Commission given authority to suspend or revoke a permit for negligent violations of

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[241]*Id.* § 49-17-17 (Supp. 1973).
[242]*Id.* § 49-17-39 (1972).
[243]*Id.* § 49-17-29(1) (Supp. 1973).
[244]Reg. APC—5-2, May 11, 1972.
[245]*Id.* at § 1.7.

the permit conditions (*e.g.*, failure to discover a malfunction in a control device). Thus permit holders are not induced to hire competent engineering and maintenance personnel. An addition to the statute,[246] outlawing the violation of the conditions of a permit, and an addition to the *Permit Regulations*,[247] declaring that permits can be revoked for negligent violations, would be useful.

The causing of water pollution, placing wastes in a location likely to cause water pollution, or discharging wastes which thereby reduce water quality below the Commission's standards are prohibited. Construction or operation of sources of discharges without a current permit also is prohibited as is increasing the volume or strength of a discharge beyond the limits in a current permit.[248] There is no counterpart for this latter prohibition in the air permit section.[249] This further identifies the need for such a provision in that section.

Construction or operation of sources other than point sources is also covered by the Act.[250] These sources, including commercial and agricultural operations if their construction or operation causes discharges into the State's waters, must be "lawfully authorized" to make discharges. This section of the Act also outlaws these activities if the properties of the State's waters are thereby altered unless the activity is "lawfully authorized." Construction of new outlets from existing sources also requires a permit. Again, the Commission may deny or revoke permits within 90 days, but a hearing must be held if requested within 30 days after a denial or revocation, and operation of the source can continue until the hearing is held and final action is taken.[251] The Commission has authority to set air and water quality standards so as to "protect the public health and welfare and the present and prospective future use of such air and of such waters." The Commission must give public notice by publication for 3 weeks in a Hinds County newspaper plus an appropriate local newspaper and conduct public hearings on standards proposed for each area. The Commission must mail notices to local officials and other persons who have requested that they be placed on the mailing list.[252]

After the standards are adopted, noncompliance is unlawful except that the Commission may allow a reasonable time for compliance by

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[246]MISS. CODE ANN. § 49-17-29 (Supp. 1973).

[247]Reg. APC—52, § 1.7, May 11, 1972.

[248]MISS. CODE ANN. § 49-17-29(2)(b) (Supp. 1973).

[249]*See id.* § 49-17-29(1).

[250]*Id.* § 49-17-29(2)(b).

[251]*Id.*

[252]*Id.* § 49-17-19. This procedure for public notice and open hearings, and for special notice to those requesting to be placed on the mailing list, is an excellent procedure and represents one of the bright spots in the Act with regard to citizen participation.

water polluters.[253] There is no such provision for a reasonable time for compliance by air polluters, but this could certainly be implied from basic due process notions. The Act should be amended to allow a reasonable time for compliance by air contaminant emitters.

Upon learning of an alleged violation, the Commission has a written complaint served on the alleged violator specifying the charges, and the violator must appear before the Commission within 10 to 31 days unless the violator requests a "special date."[254] It is not clear whether the "special date" can be more than 31 days away, and this should be clarified by way of amendment. A polluter should not be allowed to delay the hearing while his unwholesome activity continues, nor should he be required to appear without a reasonable opportunity to prepare his case. Thirty-one days is adequate time to prepare for the hearing, and further delay frustrates the purposes of the Act.

After the hearing, the Commission decides, on the basis of the evidence produced, what action is required, and it may enter an appropriate order and assess appropriate penalties. Denial or revocation of a permit also requires a fair hearing if the applicant requests one within 30 days.[255] These hearings may be conducted by the Commission itself at a meeting or by hearing-examiners appointed for the purpose. Any alleged violator, however, is entitled to a hearing before the Commission upon request. The Commission may subpoena witnesses and evidence, and contumacy is punishable by the circuit court as contempt.[256]

Commission personnel have authority to enter private property and inspect, as necessary, discharges, emissions, and any records which the Commission may require to be kept. These records include operating records, records of monitoring equipment, and results of tests on process material, fuels, emissions, discharges, or other wastes. Commission personnel may take samples and make tests themselves.[257] "Persons" having a sewage treatment plant or lagoon approved by the Commission (or the State Board of Health before 1968) do not have to comply with these record-keeping and inspection provisions.[258] These persons should also have to make tests, keep records, and allow inspections, in order to ensure the proper operation of their treatment systems. The exception should be eliminated.

The Commission may issue emergency orders and upon noncompliance can get an injunction from the chancery court. The chancery court

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[253] *Id.*
[254] *Id.* § 49-17-31.
[255] *Id.*
[256] *Id.* § 49-17-33.
[257] *Id.* § 49-17-21.
[258] *Id.*

is always open for this purpose and must give it precedence. An emergency order is effective for 45 days unless modified, cancelled, or superseded by a regular order. When a situation presents an "imminent and substantial endangerment threatening the public health and safety or the lives and property of the people," notice is given by the Commission to local authorities, the Governor, and to State civil defense authorities.[259]

Minutes of meetings and hearings, rules, regulations, and orders of the Commission must be kept as a public record and be available for public inspection. "Internal reports, memoranda, field reports, laboratory analyses and like material, other than emission data,"[260] however, must be kept confidential and out of the public's reach. This provision collides with the federal requirements[261] that information obtained be publicly available unless trade secrets would be thereby divulged. The benefits of working outside the public's probing eyesight are outweighed by the value of enlightened public pressure in counteracting pressure from regulated industries.

"Any interested person" may request a Commission hearing about any matter within its jurisdiction, and the Commission must conduct whatever investigations it deems necessary. The Commission may hold the requested hearing or hear the matter at a regular meeting if this is deemed necessary. The Commission must take appropriate action within 30 days after the hearing.[262]

Transcripts of all Commission hearings must be made available to interested parties at cost.[263] Penalties of up to $5,000 ($10,000 for water pollution violations) may be assessed by the Commission after the required hearing and are subject to judicial review by the chancery court. Each day of a violation is a separate violation. Funds collected from violators go into the Water Pollution Abatement Grant Fund. Violators who cause fish or wildlife kills must also pay for any restocking determined necessary by the Commission after consulting the State Game and Fish Commission. Owners of sources from which issue discharges requiring remedial or cleanup action (*e.g.*, oil) are liable for cleanup

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[259]*Id.* § 49-17-27.

[260]*Id.* § 49-17-23.

[261]FWPCA § 308; Clean Air Act § 114(c).

[262]Miss. Code Ann. § 49-17-35 (Supp. 1973). This section is a good compromise between not letting members of the public give their input at all and putting the Commission at the mercy of any and all citizens who would like hearings to discuss all their problems. As Mr. Justice Holmes said in Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915): "The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. . . . There must be a limit to individual argument in such matters if government is to go on." *Id.* at 445.

[263]Miss. Code Ann. § 49-17-37 (1972).

costs even if the discharge was only due to "misadventure or happenstance." This section places strict, unlimited liability on such spillers, thus going further than the federal law on this subject. Cleanup costs are borne by the Water Pollution Abatement Grant Fund into which monies recovered from the spiller in circuit court are paid.[264]

Any person or interested party aggrieved by a Commission order may petition for a hearing which must be allowed unless there has been a previous hearing on the matter. The Commission's final determination is conclusive unless appealed within 15 days to the appropriate chancery court. The chancellor may grant supersedeas and review all questions of law and of fact but only upon the record made before the Commission. The chancellor will affirm the Commission's decision if no prejudicial error is found or will reverse and remand if such error is found. The chancellor's decision may be appealed to the Mississippi Supreme Court in the usual manner.[265]

An excellent procedure is set forth whereby Commission rules, regulations, and orders having statewide application must be published in a newspaper having statewide circulation, and those having local application must be published in a newspaper published in and having circulation in the affected area. If there is no local paper, the rule, regulation, or order is posted conspicuously in three public places. Additionally, general rules, regulations, and orders must be filed with the chancery clerk of every county in the State, and locally applicable rules, regulations, or orders are filed with the chancery clerks in the affected area.[266] This procedure is far superior to that of most state agencies. According to Professor Davis, "[f]ew states require publication, and the Revised Model APA requires no more than making rules available for public inspection. Many states are grossly deficient in making rules available."[267]

Other sections of the Act require an oath and $10,000 bond from the executive director[268] and authorize a seal for the use of the Commission.[269]

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[264]*Id.* § 49-17-43 (Supp. 1973). *See* note 190 *supra*.

[265]MISS. CODE ANN. § 49-17-41 (Supp. 1973). "Review of all questions of law and fact" sounds like de novo review, but this section talks about "prejudicial error," a considerably narrower standard for review. Perhaps use of the well-understood and widely applied "substantial evidence" test for fact questions, with full review on questions of law, would be preferable. *See* note 114 *supra*.

[266]MISS. CODE ANN. § 49-17-25 (1972).

[267]K. DAVIS, ADMINISTRATIVE LAW TEXT 156 (3d ed. 1972). The regulations are also available from the Commission's regional offices in Mississippi: on the Coast, in Jackson, and in Oxford.

[268]MISS. CODE ANN. § 49-17-15 (Supp. 1973).

[269]*Id.* § 49-17-9 (1972). The seal must include the words "State Air and Water Pollution Control Commission—Mississippi—Seal." A glance at the existing Commission seal shows that the word "Seal" is absent.

It is clear that the Mississippi Air and Water Pollution Control Act, which already has been amended four times since its passage in 1966, will require yet more amendments to keep up with rapidly evolving federal environmental laws. Some of the biggest changes required are discussed in Section V of this article, devoted to an examination of EPA regulations promulgated since June 1973. These regulations threaten to turn the Clean Air Act into a national land-use policy act, and EPA and the state air pollution control agencies into zoning boards.

B. The Mississippi Coastal Wetlands Protection Law of 1973[270]

The history of the treatment of coastal wetlands[271] by private citizens, federal and state agencies, the courts, and legislative bodies appears to be a microcosm of the treatment accorded the total environment in the United States by these same groups. The thrust of early activity affecting these lands was to aid in the "development" of these areas by draining or filling with the avowed purposes of controlling mosquitoes, reducing flooding, or making the area suitable for habitation.[272] The tremendous ecological importance of these coastal areas as a vital step[273] in the life cycle of the fish and animals of the sea and its surrounding areas was not known for many years. Even since the importance of the estuaries as part of various ecosystems has been discovered and publicized, there has been an increasing trend to destroy wetlands in the name of "development" by filling and dredging for housing developments, garbage dumps, ports, industrial facilities, and a myriad of other activities.[274] The fact that there is only a limited amount of

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[270]*Id.* §§ 49-27-1 to -69 (Supp. 1973) [hereinafter cited as Mississippi Wetlands Law].

[271]The term "wetlands" will be used throughout this section to refer to lowlands which are covered with shallow waters that may be temporary or intermittent; such lands often include areas with more specific names such as marshes, swamps, or bogs. Hedeman, *Federal Wetlands Law*, in A. REITZE, ENVIRONMENTAL PLANNING: LAW OF LAND AND RESOURCES Two-8 (1974) [hereinafter cited as REITZE, PLANNING]. It should be noted that the definition given above is not synonymous with the definition of "Coastal Wetlands" as set forth in Section 49-27-5 of the Mississippi Wetlands Law as will be discussed in more detail *infra*.

[272]REITZE, PLANNING Two-10.

[273]For a thorough discussion of the critical importance of the estuaries with an analysis of the deleterious effects of changing the conditions of the area by dredging, filling, or introducing pollutants see FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, REPORT OF THE NATIONAL TECHNICAL ADVISORY COMMITTEE ON WATER QUALITY CRITERIA 66-92 (1968). An excellent treatment of the scientific proof of the value of wetlands and the role of science in public policy-making is contained in Odum & Skjei, *The Issue of Wetlands Preservation and Management: A Second View*, I COASTAL ZONE MANAGEMENT J. 151 (1974). The article offers a thorough bibliography of related materials. *Id.* at 161-63.

[274]See REITZE, PLANNING Two-10 to -16 for a vivid illustration of the loss of acres of wetlands from the mid-19th century to the present.

wetlands area which must be shared among a host of competing interests and the continued loss of wetlands have made these areas the subject of legislation on both the state and federal level.

This section of our article focuses primarily on the Mississippi Wetlands Law, which was enacted as Chapter 258 of the Laws of 1973, and offers some comparisons to provisions of wetlands bills in other states. It should be recalled that the introduction to this article referred to the Mississippi Wetlands Law as a *sample* of such legislation and not as a typical act; for the legislation in this area is too varied for the act of any state to be denominated as "typical." Before analyzing the legislation on the state level, however, it should be noted that Congress has taken some beginning steps toward preserving the natural state of our coastal wetlands by the passage of the National Estuary Protection Act,[275] the Coastal Zone Management Act of 1972,[276] and a number of statutes indirectly related to wetlands.[277] The efforts of Congress are called beginning steps because the National Estuary Protection Act provides primarily for a study and inventory of the country's estuaries and the Coastal Zone Management Act of 1972 attempts to encourage the states, by the enticement of federal grants, to establish wetlands-protection programs, but there is no federal act requiring coastal states to submit a coastal zone management plan for federal approval so as to strive for a consistent program for the nation.[278] The lack of a mandatory program at the federal level to force coordination of the programs of our coastal states has led to the variety of state acts mentioned above.

Almost all of the states bordering an ocean, the Gulf of Mexico, or one of the Great Lakes have legislated some regulation or planning study of their coastal areas.[279] The legislative actions have taken varying approaches, but all have purported to aim toward the same result—resolution of conflicting uses of the diminishing coastal zone.[280] State programs for managing the use of coastal areas include comprehensive zoning plans and statewide land planning programs committing the entire coastal area to one particular use, requiring a permit or license from a local governmental board or state agency, or a combination of these approaches.[281] The question in the area of coastal zone manage-

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[275]16 U.S.C. § 1221 (1970).

[276]Pub. L. No. 92-583, 86 Stat. 1280 (1972).

[277]See REITZE, PLANNING TWO-16 to -27 for a listing and discussion of other current federal legislation pertaining to wetlands.

[278]See *Id.* at TWO-1 to -6 for a more detailed critique of the Coastal Zone Management Act of 1972 with suggestions as to how other existing federal legislation might be used to plug the gaps in the area of enforcement.

[279]Babiarz, *Land-Use Management in Delaware's Coastal Zone*, 6 U. MICH. J.L. & REFORM 251 (1972).

[280]*Id.* at 252.

[281]*See id.* at 251-58.

ment is usually not whether land-use controls are being applied under the guise of environmental protection,[282] but whether the "management" constitutes a "taking" of the property so as to require just compensation under the fifth amendment to the United States Constitution.[283]

The Mississippi Wetlands Law opens with a noble statement of policy:

> It is declared to be the public policy of this state to favor the preservation of the natural state of the coastal wetlands and their ecosystems and to prevent the despoliation and destruction of them, except where a specific alteration of specific coastal wetlands would serve a higher public interest in compliance with the public purposes of the public trust in which coastal wetlands are held.[284]

Unfortunately, the remainder of the Act does not live up to this high-sounding declaration of policy. The succeeding section of definitions severely limits the effect of the Act by defining "coastal wetlands" to mean "all *publicly* owned lands subject to the ebb and flow of the tide and which are below the watermark of ordinary high tide, all *publicly* owned accretions above the watermark of ordinary high tide, and all *publicly* owned submerged water bottoms below the watermark of ordinary high tide."[285] Mississippi is one of the few states[286] that restrict only those activities conducted on public lands, and such a limitation severely weakens the operation of the Wetlands Law. The definition

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[282]See the discussion of the "non-degradation" clause and the "indirect sources" clause of the Clean Air Act in section V *infra*.

[283]A thorough treatment of the many theories which have been used by the Supreme Court of the United States and the state courts to determine whether a regulation is equivalent to a taking, with particular emphasis on wetlands legislation, may be found in Comment, *The Wetlands Statutes: Regulation or Taking?*, 5 CONN. L. REV. 64, 72-83 (1972). Also, an excellent study of the entire question of the constitutional limits of governmental authority to regulate the use of privately-owned land without paying compensation to the owners is F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973), which was written for the Council on Environmental Quality. Chapter 2 of this well-documented work is devoted to wetlands acts and the authors' general conclusion at page 323, here quoted, is worthy of note for anyone interested in the issue:

> We discovered an interesting trend. Although the number of cases is still small, there is a strong tendency on part of the courts to approve land use regulation if the purpose of the regulation is statewide or regional in nature rather than merely local. Although the courts are also supporting local land use regulations with a reasonable degree of consistency, they show an obvious preference for regulations having broad multi-purpose goals.

[284]Miss. Wetlands Law § 49-27-3.

[285]Act of Mar. 25, 1974, H. B. 600, § 1, 1974 Reg. Sess., Miss. Leg. Adv. Sh. 3-23, *amending* Miss. Wetlands Law § 49-27-5(a) (emphasis added).

[286]*See, e.g.*, MD. ANN. CODE art. 66C, §§ 719, 721 (1970), which provides for regulation by permit for only those lands not transferred by the state.

of "coastal wetlands" as quoted above would indicate that the Mississippi Legislature intended to limit the Act so as to apply only to those lands subject to the common law public trust doctrine as set forth in the 1972 Mississippi decision of *International Paper Co. v. State Highway Department*.[287]

The Mississippi Marine Resources Council[288] is the agency charged with regulating the "coastal wetlands" by the approval or disapproval of applications for permits[289] which are required for conducting any "regulated activity"[290] affecting the "coastal wetlands." The permit method of regulation has been used successfully by other coastal states,[291] but it appears that the Mississippi Wetlands Law has not provided the Council with sufficient authority to regulate the total wetlands area in a comprehensive and adequate manner. If the exclusion of privately owned lands, as discussed above, is not enough to defeat the stated purpose of the Act, the exemption section[292] of the law delivers the

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[287]271 So. 2d 395 (Miss. 1972). For a discussion of the *International Paper Co.* case and the earlier Mississippi cases dealing with the public trust doctrine see 44 MISS. L.J. 322 (1973). The law in the area of public trust concerning wetlands has developed in a piecemeal fashion from state-to-state and has been the subject of much legal literature in recent years. For a listing of articles discussing the doctrine in California, Maryland, Massachusetts, New Jersey, North Carolina, South Carolina, Washington, and Wisconsin, see *id.* at 322, 324 n.14. The basic premise of the common law public trust doctrine is that title to the lands subject to the ebb and flow of the tides is held by the sovereign in trust for the public to protect certain traditional rights (*i.e.*, navigation, commerce, fishing) of the public in such lands. For a view of some of the complex problems surrounding application of this doctrine see, *e.g.*, Nelson, *State Disposition of Submerged Lands versus Public Rights in Navigable Waters*, 3 NATURAL RESOURCES LAW. 491 (1970); Porro, *Invisible Boundary—Private and Sovereign Marshland Interests*, 3 NATURAL RESOURCES LAW. 512 (1970).

[288]Miss. Wetlands Law § 49-27-5(g), *reenacted by* Act of Mar. 25, 1974, H.B. 600, § 1, 1974 Reg. Sess., Miss. Leg. Adv. Sh. 3-24.

[289]Miss. Wetlands Law § 49-27-9.

[290]*Id.* § 49-27-5(c), *reenacted by* Act of Mar. 25, 1974, H.B. 600, § 1, 1974 Reg. Sess., Miss. Leg. Adv. Sh. 3-23, states:

> "Regulated activity" means any of the following activities: the dredging, excavating, or removing of soil, mud, sand, gravel, flora, fauna, or aggregate of any kind from any coastal wetland; the dumping, filling or depositing of any soil, stones, sand, gravel, mud, aggregate of any kind or garbage, either directly or indirectly, or on any coastal wetlands; killing or materially damaging any flora or fauna on or in any coastal wetlands; and the erection on coastal wetlands of structures which materially affect the ebb and flow of the tide.

[291]*See, e.g.*, Delaware Coastal Zone Act, DEL. CODE ANN. tit. 7, ch. 70, §§ 7001, 7004 (1971). A thorough analysis of Delaware's Coastal Zone Act which combines exclusion of heavy industry uses with regulation by permit of other uses may be found in the article by Babiarz, *supra* note 279.

[292]Act of Mar. 25, 1974, H.B. 600, § 2, 1974 Reg. Sess., Miss. Leg. Adv. Sh. 3-24-25, *amending* Miss. Wetlands Law § 49-27-7. The provisions of this chapter shall not apply to the following activities, areas and entities:

(a) The accomplishment of emergency decrees of any duly appointed health officer of a county or municipality or of the state, acting to protect the public health;

(b) The conservation, repletion and research activities of the Mississippi Marine Conservation Commission, the Mississippi Marine Resources Council, the Mississippi Gulf Coast Research Laboratory, the Mississippi Game and Fish Commission, and the Mississippi-Alabama Sea Grant Consortium when acting through the Mississippi Universities Marine Center;

(c) Hunting, erecting duckblinds, fishing, shellfishing and trapping when and where otherwise permitted by law;

(d) Swimming, hiking, boating or other recreation that causes no material harm to the flora and fauna of the wetlands;

(e) The exercise of riparian rights by the owner of the riparian rights, provided that the construction and maintenance of piers, boathouses and similar structures are constructed on pilings that permit a reasonably unobstructed ebb and flow of the tide; provided, further, that the riparian owner may reasonably alter the wetland at the end of his pier in order to allow docking of his vessels;

(f) The normal maintenance and repair of bulkheads, piers, roads and highways existing on the date of enactment of this chapter, and all interstate highways planned but not yet under construction; and financed in part by Federal Interstate Highway Trust Funds;

(g) Wetlands developed in the future by Federal, State or county governments for the establishment of a superport or a pipeline buoy terminal for deep-draft, ocean-going vessels, including but not limited to, wetlands adjacent Petit Bois Island and the Bayou Casotte Channel in Jackson County, Mississippi;

(h) The Biloxi Bridge and Park Commission, Biloxi Port Commission, Long Beach Port Commission, Pass Christian Port Commission, Pascagoula Port Commission and any municipal or local port authorities;

(i) Wetlands used under the terms of the use permit granted by Chapter 395, Laws of 1954;

(j) Any activity affecting wetlands that is associated with or is necessary for the exploration, production or transportation of oil or gas when such activity is conducted under a current and valid permit granted by a duly constituted agency of the State of Mississippi;

(k) Activities of any mosquito control commission which is a political subdivision or agency of the State of Mississippi;

(l) The Fisherman's Wharf to be constructed in Biloxi and the Buccaneer State Park to be constructed in Hancock County, both by the State Park Commission;

(m) Wetlands conveyed by the state for industrial development thereon pursuant to Section 211, Mississippi Constitution of 1890, and pursuant to Section 29-3-61, Mississippi Code of 1972;

(n) Coastal wetlands within five (5) feet of private property;

(o) The activities of the Hancock County Port and Harbor Commission affecting wetlands within its jurisdiction;

(p) The activities of the Harrison County Development Commission affecting wetlands within its jurisdiction;

(q) The activities of the Jackson County Port Authority affecting wetlands within its jurisdiction;

(r) The activities of the Mississippi State Port at Gulfport affecting wetlands within its jurisdiction; and

death-blow. An examination of the large geographic areas exempted together with the blanket exemptions given to the activities of most of the political subdivisions which affect the wetlands can only lead one to believe that the Council has been armed with a pea shooter and sent out to slay a dragon. The authors strongly recommend that the Mississippi Legislature close these gaps in the coverage of the Mississippi Wetlands Law so that the use of these valuable and irreplaceable lands may be properly controlled before it is too late.

The provisions of the Mississippi Wetlands Law regarding applications for permits, hearings and notice of hearings,[293] appeals to the chancery court from decisions of the Council,[294] and appeals to the Mississippi Supreme Court[295] appear to be very workable, but since experience is the best teacher in dealing with such provisions, it is too early to tell. Only approximately 10 applications for permits have been made under the Wetlands Law as of June 7, 1974.[296] The same comment may be made concerning the enforcement sections of the Act. The provisions for civil liability[297] include restoration of damaged wetlands, punitive damages for failure to comply with a restoration order, and injunctive relief. Criminal liability consists of fines of up to $1,000, imprisonment for not more than 30 days, or both, and in the case of continuing violations, each day constitutes a separate violation.[298]

The statement of policy in the Mississippi Wetlands Law is a goal that must be achieved, for the loss of our wetlands will be felt by all of the citizens of Mississippi and the nation. These precious lands can only be preserved to continue their work as an instrumental part of the life cycle of the flora and fauna of the marshes and seas by careful and orderly regulation of the use of the *entire* area. The Executive Director

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(s) In the case of regulated activities which, in the judgment of the director of [*sic*] his delegate, after an on-site inspection, have no harmful impact on the environment and which make no substantial change in the wetlands, the director may issue a certificate of waiver, and no permit shall be required.

Provided, however, that all parties or agencies exempt from the regulatory provisions, whether by name or reference, when carrying out what would otherwise be regulated activities in coastal wetlands shall at all times adhere to the policy as set forth in Section 49-27-3 and each such agency shall further advise the council of all such activities so that the council may be fully advised of all activities in the coastal wetlands.

[293]Act of Mar. 25, 1974, H.B. 600, § 4-5, 1974 Reg. Sess., Miss. Leg. Adv. Sh. 3-27, *amending* Miss. Wetlands Law §§ 49-27-15 to -17.

[294]Miss. Wetlands Law §§ 49-27-41 to -47.

[295]*Id.* § 49-27-49.

[296]Telephone interview with James B. Rucker, Executive Director of the Mississippi Marine Resources Council, June 7, 1974.

[297]Miss. Wetlands Law § 49-27-55.

[298]*Id.* § 49-27-57.

of the Mississippi Marine Resources Council has viewed the role of his agency as follows:

> The ability of the Council to issue or deny a permit will effectively control the activities which will affect wetlands. This permitting authority will provide for *orderly, comprehensive development or preservation of the remaining marshland.*[299]

The authors suggest that the orderly, comprehensive development or preservation of the remaining marshlands cannot be achieved without the action of the legislature called for above. Many other states have established strong programs to protect their wetlands in an orderly and comprehensive manner,[300] and Mississippi should join these ranks during the next session of the legislature.

V. Federal Controls on Land Use: EPA's Regulations on "Indirect Sources" and "Significant Deterioration"

A. Introduction

At the beginning of this article the authors put forward the thesis that while Congress debates the propriety of land-use controls, EPA and the courts have already fashioned land-use regulations from the boilerplate of NEPA and the Clean Air Act. The cases applying NEPA to apartment buildings, shopping malls, and the like have already been discussed.[301] This section will examine some of EPA's recent regulations under the Clean Air Act with an eye toward forecasting the likely impact of the new regulations on the already complicated process of planning and controlling the use of land.[302]

B. EPA Review of Indirect or Complex Sources

As noted previously in the section of this article on the Clean Air

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[299]Letter from James B. Rucker, Executive Director of the Mississippi Marine Resources Council, to Freida G. Collins, Coordinator, Sea Grant Program, University of Mississippi School of Law, July 27, 1973 (emphasis added).

[300]The scope of this article does not permit a close comparison of the provisions of the Mississippi Wetlands Law with the provisions of wetlands legislation in other jurisdictions. For a discussion of such legislation in other states see Reitze, Planning Two-67 to -82 (the Maryland wetlands); Babiarz, *supra* note 279, at 258 (the Delaware Coastal Zone Act); Luken, *Preservation of Wetlands: The Case of San Francisco Bay*, 14 Natural Resources J. 139 (1974); *On the Legal Aspects of North Carolina Coastal Problems: A Symposium*, 49 N.C.L. Rev. 857 (1971); Note, *Coastal Wetlands in New England*, 52 Boston U.L. Rev. 724 (1972) (Massachusetts, New Hampshire, Maine, Connecticut, Rhode Island); Comment, *A Decision-Making Process for the California Coastal Zone*, 46 S. Cal. L. Rev. 513 (1972) (California Coastal Zone Conservation Act of 1972).

[301]*See* part III(A) *supra*.

[302]Two excellent articles appearing recently in this journal are of material benefit to the Mississippi practioner engaged in land-use control law. They are Khayat & Reynolds,

Act, EPA was required to promulgate regulations for the preparation, adoption, and submission of state implementation plans under Section 110 of the Act. EPA promulgated these regulations in August 1971,[303] and began reviewing the state implementation plans which were submitted. In May 1972, EPA published its initial approvals and disapprovals of state implementation plans.[304] The Natural Resources Defense Council, Inc., (NRDC) and other petitioners challenged EPA's actions in the United States Court of Appeals for the District of Columbia Circuit, contending, *inter alia*, that the approved plans did not adequately ensure maintenance of ambient air quality standards. The court of appeals agreed and ordered EPA to review the plans further to determine whether they had sufficient procedures for assessing the impact of growth on long-term air quality and whether there were adequate provisions for maintaining air quality standards once they had been achieved.[305]

Upon additional review, EPA's Administrator determined that no state implementation plan "had adequately analyzed the impact of growth on air quality maintenance for any significant period of time into the future."[306] Therefore, all state plans were disapproved with respect to maintenance of standards on March 8, 1973.[307] And on April 18, 1973, EPA proposed new amendments to include review of "indirect" or "complex" sources as one of the required elements of an approvable state implementation plan.[308] On June 18, 1973, EPA promulgated guidelines for preparation, adoption, and submittal of implementation plans including provisions for review of indirect sources to ensure maintenance of national ambient air quality standards.[309] The preamble to the June 18, 1973, regulations stated:

> In the preamble to the proposed amendments, [on April 18, 1973] the Administrator called attention to the importance of analyzing the general growth of population, industrial activity, and mobile sources in relation to regional air quality. The Administrator did not propose to

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Zoning Law in Mississippi, 45 MISS. L.J. 365 (1974) and Pyle & Mockbee, *Municipal Annexation in Mississippi*, 45 MISS. L.J. 393 (1974). The vagaries of local land-use controls are left to those articles. This one will concentrate on federal and state controls, especially those which masquerade as environmental protection regulations.

[303]42 C.F.R. pt. 420 (1971).

[304]40 C.F.R. §§ 52.01 -.15 (1972). Mississippi's plan was among the first ones approved. *Id.* The plan is on file with all chancery clerks as well as with the Commissioner's regional offices and headquarters.

[305]Natural Resources Defense Council, Inc. v. EPA, 475 F.2d 968 (D.C. Cir. 1973).

[306]39 Fed. Reg. 7270 (1974).

[307]*Id.* at 6279 (1973). Mississippi's plan was among the plans disapproved on this ground. *Id.*

[308]*Id.* at 9599.

[309]40 C.F.R. §§ 51.1(f),(g), .5(a)(3), .11(a)(4), .12(e)-(h), .18(a)-(i) (1973).

> require such analysis, but urged that states consider the use of such procedures. A number of comments were received urging that such analysis be required on the ground that preconstruction review of individual sources could not adequately deal with generalized growth and its impact on regional air quality. It is the Administrator's judgment that such procedures, in addition to review of new or modified sources, are necessary to insure maintenance of the national standards, particularly because source-by-source analysis is not an adequate means of evaluating, on a regional scale, the air quality impact of growth and development.[310]

Accordingly, EPA required the states to identify areas which "due to current air quality and/or projected growth rate, may have the potential for exceeding any national [ambient air quality] standard within the next 10-year period."[311] In these potential problem areas:

> The required analysis will have to deal with all the significant air quality implications of growth and development, including not only the increased air pollution arising directly from new commercial, industrial, and residential development but also that arising from increases in demand for electricity and heat, motor vehicle traffic, and production of solid waste.[312]

Many EPA-watchers decried what appeared to be a wholesale plunge by EPA into land-use planning. EPA answered:

> Several comments were received which questioned whether EPA has legal authority to promulgate requirements for review of the indirect impact of new or modified sources, i.e., the impact arising from associated mobile source activity. Essentially, the argument was made that EPA's authority in this regard is limited to requiring an assessment of the air quality impact of pollutants emitted directly from stationary sources. EPA believes that this argument is inconsistent with the provisions of section 110(a)(2)(B) [of the Clean Air Act], which requires that implementation plans include " * * * such other measures as may be necessary to insure attainment and maintenance of such primary and secondary standard, including, but not limited to, land-use and transportation controls." In the Administrator's judgment, review of the indirect impact of new or modified sources is just as necessary to insure maintenance of the national standards as is review of the direct impact.[313]

The June 18 regulations went on to spell out the specific requirements of an acceptable plan with regard to review of indirect sources.

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[310] 38 Fed. Reg. 15834 (1973).

[311] *Id.*

[312] *Id.*

[313] *Id.* at 15835.

A few states submitted revised plans, but EPA was required, again by court order, to go ahead and adopt its own indirect source review regulations for those states who did not, or could not, impose such land use controls on themselves. In the preamble to these regulations, EPA's new Administrator, Russell Train, stated:[314]

> The regulations proposed below provide that the review procedures will be carried out by State or local agencies designated by the Governor. It is recognized that many states do not yet have adequate legal authority to approve or disapprove construction or modification of indirect sources . . . . Since the decisions which will have to be made pursuant to these proposed regulations are pertinent to local situations, the Administrator encourages and strongly supports the exercise of this authority at the State and local level. Where states are unwilling or unable to implement these procedures, however, it will be necessary for EPA to assume the responsibility.[315]

After this warning to the states that EPA would assume land-use control responsibility for them if they did not cooperate, the Administrator added, almost as an afterthought: "States may also wish to broaden such review [indirect source review] to consider other environmental or social considerations."[316]

Finally, on February 25, 1974, EPA published the final regulations for review of indirect sources.[317] Not surprisingly, only a handful of states had submitted indirect source review procedures for approval. In fact, only Guam and Florida submitted totally approvable plans.[318] For all the other states (including Mississippi) Section 52.22 of Title 40 of the Code of Federal Regulations was incorporated by EPA into the state implementation plans.[319] This regulation requires that: "No owner or

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[314]Russell Train became Administrator of EPA by his own request in mid-1974 so that he could be "where the action is." Formerly he had been President of the Conservation Foundation, Under Secretary of the Interior, and Chairman of the Council on Environmental Quality. Train replaced Robert Fri, who served as Acting Administrator from spring of 1973 until mid-1974. Fri had formerly been Deputy Administrator to William Ruckelshaus, who ran EPA from its inception in 1970 until his departure to become Assistant Attorney General in 1973. Ruckelshaus is now back in private practice, having left the Justice Department in October 1973.

[315]38 Fed. Reg. 29894 (1973).

[316]*Id.*

[317]40 C.F.R. § 52.22(a)(b) (1974).

[318]39 Fed. Reg. 7271 (1974). Florida's willingness to impose these additional land-use controls is not surprising in light of the stringent new Florida Environmental Land and Water Management Act, FLA. STAT. ANN. §§ 380.12 *et seq.* (Supp. 1973). This Act, which is similar to recent acts passed by Maine, ME. REV. STAT. ANN. tit. 12, §§ 681 *et seq.*, tit. 38, § 482(2) (1970 Supp.); and Hawaii, HAWAII REV. STAT. §§ 205-1 to -15, 246-10, 248-2, 46-4 (Supp. 1973), sets up a state authority to review major new developments with regional or statewide impact, and to withhold permits from developments deemed unwise.

[319]39 Fed. Reg. at 7282. EPA recognized that Mississippi, like most of the states, did

operator of an indirect source subject to this paragraph shall commence construction or modification of such source after December 31, 1974, without first obtaining approval from the Administrator."[320]

The regulation defines "indirect source" as follows:

> The term "indirect source" means a facility, building, structure, or installation which attracts or may attract mobile source activity that results in emissions of a pollutant for which there is a national standard. Such indirect sources include, but are not limited to:
> (a) Highways and roads.
> (b) Parking facilities.
> (c) Retail, commercial and industrial facilities.
> (d) Recreation, amusement, sports and entertainment facilities.
> (e) Airports.
> (f) Office and government buildings.
> (g) Apartment and condominium buildings.
> (h) Education facilities.[321]

The regulation also defines which indirect sources are subject to EPA scrutiny via the preconstruction review process. There are different minimum sizes depending on whether the source is inside a Standard Metropolitan Statistical Area (SMSA) or outside an SMSA. Inside the SMSA, the requirements apply to:

> (a) Any new parking facility, or other new indirect source with an associated parking area, which has a parking capacity of 1,000 cars or more; or
> (b) Any modified parking facility, or any modification of an associated parking area, which increases parking capacity by 500 cars or more; or
> (c) Any new highway section with an anticipated average annual [annual average?] daily traffic volume of 20,000 or more vehicles per day within ten years of construction; or

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not have adequate "statutory authority to prevent construction, modification, or operation of a facility, building, structure, or installation, or combination thereof, which indirectly results or may result in emissions of any air pollutant at any location which will prevent the maintenance of a national ambient air quality standard . . . ." *Id.*

If and when EPA delegates indirect source reviewing authority to a state agency, that agency must make its determinations using the same criteria and procedures as are set forth in the regulations for EPA itself. Additionally, the state agency must consult with the state air pollution control agency (if it is not that agency itself) and with "the appropriate state or local land use planning agency" prior to making a determination on an application. Also, notice of application must be sent to the Regional EPA Office by the state agency. 40 C.F.R. §§ 52.22(b)(14)(i), (iii) (1974).

[320] 40 C.F.R. § 52.22(b)(3) (1974).

[321] *Id.* § 52.22(b)(1)(i). Curiously, churches are not in the list. Perhaps EPA was unwilling to confront a first amendment challenge, or perhaps EPA realized that most church-generated traffic is on Sunday when other traffic is at a minimum.

> (d) Any modified highway section which will increase average annual daily traffic volume by 10,000 or more vehicles per day within ten years after modification.[322]

Outside an SMSA, the regulations apply to indirect sources with associated parking capacity of 2,000 cars or more or modifications to parking areas which increase capacity by 1,000 cars or more.[323] Highways outside any SMSA are not covered, but new airports with 50,000 or more "operations" (take-offs or landings) per year or 1,600,000 or more passengers per year and existing airports that plan to increase service by these amounts are covered whether within any SMSA or not.[324]

The regulations add together incremental construction or modification in determining whether a permit is required.[325]

The regulations also define the terms "to commence construction" and "to commence modification" as follows:

> (vi) The phrase "to commence construction" means to engage in a continuous program of construction including site clearance, grading, dredging, or land filling specifically designed for an indirect source in preparation for the fabrication, erection, or installation of the building components of the indirect source. For the purpose of this paragraph, interruptions resulting from acts of God, strikes, litigation, or other matters beyond the control of the owner shall be disregarded in determining whether a construction or modification program is continuous.
> (vii) The phrase "to commence modification" means to engage in a continuous program of modification, including site clearance, grading, dredging, or land filling in preparation for a specific modification of an indirect source.[326]

Assume that you are an attorney representing a client who has purchased a large tract of land on which the client plans to build a shopping center with parking for 2,500 cars, if outside an SMSA, or 1,500 cars, if inside an SMSA. Assume further that your client has not "commenced construction" before December 31, 1974 when the above regulations take effect. How do you go about getting an EPA permit for your client to build the shopping center? The regulations say that applications are to be made "by means prescribed by the Administrator."[327] Presumably EPA will devise a form for the application, so you should contact EPA[328] or your state pollution control agency to get the right form.

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[322] *Id.* § 52.22(b)(2)(i).
[323] *Id.* § 52.22(b)(2)(ii).
[324] *Id.* § 52.22(b)(2)(iii).
[325] *Id.* § 52.22(b)(2)(iv).
[326] *Id.* §§ 52.22(b)(1)(vi), (vii).
[327] *Id.* § 52.22(b)(3).
[328] The Region IV address for EPA is 1421 Peachtree St., N.E., Atlanta, Ga., 30309.

If your client was required by some other agency or federal court to write an environmental impact statement under NEPA,[329] this impact statement may also suffice as the application for an indirect source permit from EPA. If an environmental impact statement was not written or, if written, did not provide enough information to satisfy EPA, data must be provided on the proposed site, the activities to be carried on there, and the predicted effect on traffic volume.[330] The required data for permits for airports, highways, and other indirect sources are also spelled out in the regulations.[331]

If you have found the requisite engineers, meteorologists, and seers to develop and assemble the required data for the application, what

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[329]40 C.F.R. § 52.22(b)(3) (1974). *See* section III(A) *supra*, for a discussion of when NEPA may apply and what is required in an environmental impact statement.

[330]The details that must be submitted for such construction are as follows:

(a) The name and address of the applicant.

(b) A map showing the location of the site of the indirect source and the topography of the area.

(c) A description of the proposed use of the site, including the normal hours of operation of the facility, and the general types of activities to be operated therein.

(d) A site plan showing the location of associated parking areas, points of motor vehicle ingress and egress to and from the site and its associated parking areas, and the location and height of buildings on the site.

(e) An identification of the principal roads, highways, and intersections that will be used by motor vehicles moving to or from the indirect source;

(f) An estimate, as of the date of the application, of the average daily traffic volumes, peaking characteristics, and levels of service at controlled intersections identified pursuant to paragraph [*sic*] (b)(3)(i)(e) of this section located within one-fourth mile of all boundaries of the site;

(g) An estimate of the average daily vehicle trips, and the peaking characteristics of such trips, required to move people to and from the source during the first year after the date all aspects of the indirect source are completed and open for business or fully operational;

(h) An estimate of the maximum number of vehicle trips that would occur within one-hour and eight-hour periods during the first year after the date all aspects of the indirect source are completed and open for business or fully operational.

(i) An estimate of the average daily traffic volumes, peaking characteristics, and levels of service that would occur at the intersections identified pursuant to paragraph [*sic*] (b)(3)(i)(e) of this section during the first year after the date all aspects of the indirect source are completed and open for business or fully operational.

(j) Availability of existing and proposed mass transit to service the site.

(k) Any additional information or documentation that the Administrator deems necessary to determine the air quality impact of the indirect source, including the submission of measured air quality data at the proposed site prior to construction or modification.

40 C.F.R. § 52.22(b)(3)(i) (1974).

[331]*Id.* §§ 52.22(b)(3)(ii), (iii).

happens next? First, EPA must notify you of any deficiency in the data within 20 days after receiving the application.[332] From the date of the receipt of the last application, EPA has 30 days to make a preliminary determination of approval or disapproval and to give notice of the application to state and local agencies (including planning agencies). The public is informed via a "prominent advertisement" in a newspaper circulated in the area.[333] From the date of the public notice EPA must allow 30 more days for public comment on the application[334] and then make a final decision within 30 days after the close of the public comment period.[335] EPA, however, can unilaterally extend each of the three 30-day periods by 30 more days or even longer if the applicant agrees.[336] Thus the final decision on your client's permit could take 6 months, even if you include all necessary information in the original application.

At last your client is notified of EPA's decision to approve or disapprove the application. If it is approved, the bulldozers can begin work.[337] If it is disapproved, EPA must tell you why, and you may appeal this action to the appropriate United States court of appeals, just as with any EPA action under the Clean Air Act.[338]

Instead of outright denial of the permit, EPA may grant a permit conditioned on the applicant's securing binding commitments from other governmental agencies, or making commitments himself, for roadway or mass transit improvements in the area or for completion of other "reasonable conditions . . . related to the air quality aspects of the proposed indirect source . . . ."[339] EPA makes its decision on the application based on the use of an appropriate diffusion model and the traffic flow data in the application. Your client can submit his own diffusion model to EPA, but EPA only has to "consider" it.[340]

What happens if you and your client are unsuccessful in convincing EPA to approve your application but decide to build anyway, or if you simply choose to begin construction without bothering with the procedure described above? Your client would be guilty of violating an emission standard under Section 304 of the Clean Air Act, and would be subject to the penalties of Section 113 of the Clean Air Act—a fine of $25,000 per day of violation and/or 1 year in prison. The second conviction could cost $50,000 per day or 2 years in prison, or both.[341]

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[332]*Id.* § 52.22(b)(8)(i).

[333]*Id.* § 52.22(b)(8)(ii).

[334]*Id.* § 52.22(b)(8)(iv).

[335]*Id.* § 52.22(b)(8)(v).

[336]*Id.* § 52.22(b)(8)(vi).

[337]*Caveat*: Even if you have a valid permit to begin construction, a delay of 18 months renders the permit invalid unless EPA grants a time extension. *Id.* § 52.22(b)(12).

[338]Clean Air Act § 307(b). *See* note 142 and accompanying text *supra*.

[339]40 C.F.R. § 52.22(b)(9) (1974).

[340]*Id.* § 52.22(b)(4)(ii)(d).

[341]*Id.* § 52.22(b)(11).

Deliberately made false statements in the application can cost your client $10,000 or 6 months in prison, or both.[342]

About the best advice you can give your present clients is to get started on any proposed large projects before December 31, 1974, and limit the size of parking facilities at projects begun after that time to 999 cars or less, if inside an SMSA, or 1,999 cars or less, if outside an SMSA.

C. Prevention of Significant Air Quality Deterioration

This article previously discussed how the combined efforts of the Natural Resources Defense Council and the United States Court of Appeals for the District of Columbia resulted in EPA's promulgation of regulations for review of "indirect sources" of air pollution. EPA's regulations for prevention of significant deterioration of air quality in areas where the existing air quality already exceeds the national primary and secondary air quality standards are the result of a suit filed in May 1972 by the Sierra Club. The Sierra Club asked the United States District Court for the District of Columbia to issue a preliminary injunction requiring EPA to "disapprove any portion of a state plan which failed to effectively prevent significant deterioration of existing air quality."[343] The district court issued the preliminary injunction, and its decision was affirmed by the court of appeals. The Supreme Court, on June 11, 1973, affirmed the judgment of the court of appeals by a 4-4 vote, no opinion being written.[344] EPA, acting in accordance with the preliminary injunction, disapproved all state implementation plans on November 9, 1972, because the plans failed to prevent significant deterioration of existing air quality.[345] Then in July 1973 EPA issued new proposed regulations for the prevention of significant deterioration of existing air quality.[346] Exhibiting candor not usually found in federal agencies, EPA's preamble to the new regulations explained how the agency had been forced into this endeavor.[347] The preamble also explained the far-

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[342]Clean Air Act § 113(c)(2).

[343]38 Fed. Reg. 18986 (1973).

[344]Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.C. Cir. 1972), *aff'd sub nom. by an evenly divided Court*, Fri v. Sierra Club, 412 U.S. 541 (1973) (also known as the "Four Corners" case).

[345]37 Fed. Reg. 23836 (1972).

[346]40 C.F.R. § 52.21 (1973).

[347]In EPA's view there has been no definitive judicial resolution of the issue whether the Clean Air Act requires prevention of significant deterioration of air quality. When the issue was presented to the Supreme Court, the Court was equally divided. The Court's action had the effect of permitting to stand the judgment of the Court of Appeals for the District of Columbia Circuit, which was entered in the procedural context of the issuance of a preliminary injunction.

reaching effects of the proposed regulations and why the usual rulemaking procedure was being scrapped in favor of advancing four alternative sets of regulations based on differing philosophies and definitions of "significant deterioration."[348] After reviewing the positive effects on air quality caused by reducing vehicle emissions and forcing attainment of national standards in areas which presently are not meeting them,[349] EPA then described the limits of its authority and why prevention of significant deterioration exceeds those limits.[350]

In the absence of a definitive judicial decision on the issue, the Administrator adhers to the view that Section 110 of the Clean Air Act requires EPA to approve state implementation plans that will attain and maintain the national ambient air quality standards, and that the Act does not require EPA or the states to prevent significant deterioration of air quality. The proposed alternative regulations set forth herein would establish a mechanism for preventing significant deterioration pursuant to the preliminary injunction issued by the District Court.

38 Fed. Reg. 18986 (1973).

[348]The question raised by the Sierra Club suit was a legal issue, i.e., interpretation of the language and legislative history of the Clean Air Act. Thus, the courts were asked to determine that the Act requires the Administrator to ensure that state implementation plans will not permit significant deterioration of air quality. What the courts were not asked to determine is what constitutes significant deterioration and exactly how it will be prevented.

A national policy of preventing significant deterioration, however defined and implemented, will have a substantial impact on the nature, extent, and location of future industrial, commercial, and residential development throughout the United States. It could affect the utilization of the nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods. Without implying any judgment as to the general acceptability of any of the effects of a "no significant deterioration" policy, the Administrator believes that the question of how such a policy should be defined and implemented cannot properly be addressed, much less decided, on narrow legal grounds. Rather, it is a question that must be discussed, debated and decided as a public policy issue, with full consideration of its economic and social implications. To approach the question in any other manner would be much too simplistic. There is, perhaps, no other environmental issue that imposes upon the Administrator, and the public, a greater obligation to formulate and objectively evaluate a range of possible solutions. The usual rulemaking procedure clearly is inadequate in this case. Accordingly, this notice sets forth four alternative sets of proposed regulations based upon different philosophies and administrative approaches to defining and preventing significant deterioration.

Id.

[349]For example, attainment of primary standards in Philadelphia will reduce the ambient sulfur dioxide concentration in rural New Jersey from 25 ug/m^3 (micrograms per cubic meter) to 10 ug/m^3 (as compared to a national secondary standard for SO_2 of 60 ug/m^3). *Id.* at 18986-87.

[350]Section 109 of the Clean Air Act requires the Administrator to establish national primary ambient air quality standards "to protect the public health"

The clause in the Clean Air Act on which the Sierra Club relied in its suit was a clause in section 101(b)(1) declaring that one of the purposes of the Act is "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population." Relying on the last part of that clause, wherein the promotion of the productive capacity of the population is called for (including, arguably, providing that population with gainful employment), EPA concluded: "Clearly, it is not within the province of EPA, under either the Clean Air Act, or any other statute, to impose limitations on the nation's growth."[351]

Having thus concluded that it had no authority to do what it was about to do, EPA sets forth four sets of alternative regulations, all of which will to varying degrees "impose limitations on the nation's growth."[352]

All four of the proposals are based on EPA's definition of the problem to be solved:

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and national secondary ambient air quality standards "to protect the public welfare from any known or anticipated adverse effects," including, as specified by section 302(h), "effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." Such national standards must be based on air quality criteria which, under section 108, must "reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health and welfare which may be expected from the presence [of air pollutants] in the ambient air, in varying quantities." Thus, standard-setting under section 109 is necessarily limited to demonstrable or predictable adverse effects which can be quantitatively related to pollutant concentrations in the ambient air.

The basis for preventing significant deterioration therefore lies in a desire to protect aesthetic, scenic, and recreational values, particularly in rural areas, and in concern that some air pollutants may have adverse effects that have not been documented in such a way as to permit their consideration in the formulation of national ambient air quality standards.

Id. at 18987.

[351]*Id.*

[352]Recognizing that "normal economic expansion can be expected to lead to increased emissions in some local areas which previously were undeveloped," EPA rejected the Sierra Club's proposed method for preventing significant deterioration:

Many areas of the country have virtually no man-made emissions. To establish a policy that new emissions can only be introduced to the extent that current emissions are reduced would forever relegate these areas to an essentially undeveloped status. This feature would, in turn, require that new pollution sources be located only in the semi-urban and urban areas of the country in which improved control technology would have the greatest impact. This would force the majority of the new emissions into these areas in which the majority of the Nation's population resides.

Id.

> The problem of preventing significant deterioration can be somewhat simplistically stated as that of reducing emissions to the lowest practicable level, and then distributing those residual emissions in a manner in which they do the least harm.[353]

The first half of the problem—reducing emissions to the lowest practicable levels—is achieved by the Clean Air Act's mandate that all new sources be required to use the best available control technology.[354] The second half—distributing the "residual emissions"—is where the four proposals differ. The philosophies of the four alternatives are based upon the four decision-criteria. Each criterion is based upon one of the following alternative definitions of "significant deterioration":

> (1) definition of "significant deterioration" as a constant increment in air quality applicable nationwide,
> (2) definition of "significant deterioration" as the greater of either a percentage increase in emissions or an emission increment,
> (3) definition of "significant deterioration" on a case-by-case basis by the public in the local area affected, and
> (4) definition of "significant deterioration" as one of two air quality increments depending upon land use projections by the state.[355]

Since none of the four alternative proposals is the law, each will be examined only briefly. Under each one the federal government will be thrust deeper into the business of planning the use of land within individual states because of the Clean Air Act's basic scheme of having states implement EPA-imposed guidelines while EPA retains a veto over individual sources and even over a state's entire program.[356]

1. Air Quality Increment Plan

This set of regulations would set specific allowable increments of deterioration of existing air quality below the 1972 baseline level in any area regardless of its present air quality or socio-economic status.[357]

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[353] *Id.*

[354] Clean Air Act § 111. *See* note 116 and accompanying text *supra*.

[355] 38 Fed. Reg. 18986, 18988 (1973). The baseline year for all four proposals is 1972. *Id.*

[356] *See* notes 106 through 110 & 121 and accompanying text *supra*.

[357] The fixed increments are:

For particulate matter:
10 ug/m^3 (annual average)
30 ug/m^3 (24 hour average)

For sulfur dioxide:
15 ug/m^3 (annual average)
100 ug/m^3 (24 hour average)
300 ug/m^3 (3 hour average)

38 Fed. Reg. 18986, 18990 (1973).

Amazingly, EPA admits that "there are no quantitative data to support the choice of any specific increment below the national standards."[358] More amazingly, EPA admits that: "If this proposed regulation were implemented, it would limit future development to the level of light industrial and residential complexes, or a very small amount of heavy industry such as stringently controlled power plants."[359]

Finally, EPA concludes that this alternative "would not totally prevent economic development of all currently clean areas," but that it "would prevent construction in difficult terrain areas such as valleys or mountainous areas with poor dispersion characteristics, and . . . clustering of large sources with the potential for high localized pollutant concentrations."[360] As if all the above were not enough to condemn the fixed increment proposal, EPA further admits:

> A basic problem of this plan is the land use implications implied with no provisions to insure that they are in the best interests of the public or compatible with public desires. Inherent in any plan with a single deterioration definition applied nationally is the arbitrarily equal treatment of all equally clean areas. It may not be wise to restrict the development of waste lands to the same degree that a scenic national park is restricted, particularly if that restriction forces additional air quality deterioration on the heavily populated regions of the nation.[361]

2. Emission Limitation Plan

The idea behind the emission limitation plan is that significant deterioration of air quality can be prevented by preventing significant increases in emissions. This proposal suffers from some of the same deficiencies attributable to the first proposal, but it is even more arbitrary because it ignores topographical and meteorological differences in areas. The idea is to calculate the 1972 baseline of emissions in an Air Quality Control Region and then limit all additional emissions to a total of 20 percent of the baseline. This proposal would allow higher increases in areas with higher baselines (20 percent of a large baseline figure is larger than 20 percent of a small baseline figure). The effect would be to put more stringent limits on development of undeveloped areas than on additional development of developed areas. EPA also admits that:

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[358] *Id.*

[359] *Id.*

[360] *Id.* Thus, had this regulation been in effect at the time of the Declaration of Independence, there might never have been a Denver, Chicago, St. Louis, Atlanta, Houston, Los Angeles, San Francisco, Cincinnati, Pittsburgh, or any other large city built around clusters of industrial activity.

[361] *Id.* at 18991.

"It is possible that the development of small residential and commercial sources [*e.g.*, houses and stores] could be limited because the available emission increment is used by a few large emitters."[362]

The Hobson's choice this poses for a state is whether to allow more housing or more jobs. This is untenable, especially in a poor rural area such as North Mississippi where both jobs and housing are needed and where the 20 percent allowable increase over an extremely low baseline value would not be adequate to cover any significant new development.

3. Local Definition Plan

The third approach, which is preferred by the authors, would also require that all new sources, wherever located, apply the best practicable control technology as defined by EPA's stringent new source performance standards. Beyond this, though, the "subjective"[363] determination of what level of air quality deterioration is "significant" is left to the people directly affected—those comprising the constituency of the state and local governments involved. As EPA explains:

> This approach has the major advantage that the governmental units and citizens most affected by decisions on maintenance of air quality would make those decisions, based upon conditions existing at that time, thereby ensuring that local requirements and preferences with regard to matters such as land use, economic development, and use of natural resources are taken into consideration. Thus, economic growth would not be arbitrarily restricted to conform to national views on nationwide deterioration, but rather, would be subjected to state and local decisions as to the form, direction, extent, and distribution of such growth and as to the conditions to be imposed on the construction or modification of facilities which could have a significant impact on air quality.[364]

This proposal is subject to the same criticism which led to federal pollution control legislation in the first place—state and local governments are not sufficiently able to prevent pollution because they are pitted against other states and localities in the competitive process of attracting new industry. Offsetting this argument is the fact that all new sources, wherever located, will have to use best practicable control technology as defined by EPA. The decision that state and local governments would face is simply whether to allow new, well-controlled

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[362] *Id.*

[363] One of the major problems in defining significant deterioration is that the level at which air quality deterioration becomes "significant" is essentially subjective, and is often logically dependent on a large number of factors which vary from location to location.

Id. at 18992.

[364] *Id.*

sources or to allow no new sources at all. The state and local governments would not be able to lure new industry by relaxing control standards, for the Clean Air Act does not give them this discretion.

4. Area Classification Plan

The last proposal would require the states to classify all areas of the state as being in either Zone I, which has extremely stringent allowable increments of deterioration, or Zone II, which has larger allowable increments (in fact, the same levels as in the air quality increment proposal).[365] In comparing this "statewide zoning" plan with the other proposals, EPA states:

> Unlike the other ceiling plans proposed herein, this plan ensures that future developmental patterns can be based on rational planning rather than on previous growth patterns which form the basis for most other ceiling approaches. This alternative is also superior to the "local definition" plan, in that it is not based on case-by-case local projections of growth pattern which may not be desirable from an overall point of view, but requires that the state establish long range growth patterns and goals.[366]

The "statewide zoning" approach, however, is not perfect, even in EPA's eyes:

> The proposed regulations require that the state make very difficult and comprehensive decisions impacting on land use in a tight time frame. The results of these state decisions would have far reaching implications on the future of many states. There are no firm criteria which a state may use to make its decisions and as a result, the decisions would be somewhat subjective in nature.[367]

As if to eliminate any question as to which proposal the agency favors, EPA concludes: "Nevertheless of the available alternatives for preventing significant deterioration, this plan appears to be superior in many, if not all, respects."[368] Thus, the era of federal land use regulation to control air quality is plainly at hand. The attorney involved in land development would do well to monitor the *Federal Register* daily for the latest in the ever changing and expanding regulations in this area.

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[365]The levels are in ug/m³:

	Particulate Matter		Sulfur dioxide		
	Annual	24 Hr. Avg.	Annual	24 Hr. Avg.	3 Hr. Avg.
Zone I	5	15	2	5	25
Zone II	10	30	15	100	300

Id. at 18993.

[366]*Id.*

[367]*Id.*

[368]*Id.*

VI. Summary and Conclusions

This article was intended to accomplish three goals. First, it was thought desirable that a general review of environmental law, both Mississippi and federal, be published for the use of Mississippi attorneys. Second, a number of changes have been suggested for improving Mississippi's environmental statutes. Finally, the authors have tried, by developing the history and current status of federal and Mississippi environmental law and then examining critically the land use implications of various regulations promulgated or proposed by EPA within the past year, to show that EPA and the federal courts are already heavily involved in land use planning and that they will become even more involved in the near future. This trend toward federal control of land use may be applauded in some quarters, but at least the decision should be made by Congress or the states, not by EPA and the District of Columbia courts.[369] The intentions of EPA are clearly that there will be more, not less, federal control on land use in the future. "[I]t may become desirable to include requirements for growth projections in the proposed regulations [for prevention of significant deterioration] in a manner similar to those of the recently promulgated complex source regulations."[370] And the disclaimers of such intentions seem to ring hollow:

> In effect, Federal promulgation of any of the alternatives proposed herein will force States to develop and implement additional land use planning activities through which the available air resource can be allocated for the optimum purposes. These activities will be actively encouraged by the Administrator, and it is planned that eventually the prevention of significant deterioration will be accomplished solely through State Implementation Plan procedures, although such SIPs would have to be in accordance with federal guidelines.[371]

This article has tried to cover a rapidly expanding field and in doing so has been necessarily superficial in discussing some areas. For example, the 1972 amendments to the federal Water Pollution Control

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[369]Congress, of course, has arguably decided that federal land-use controls are necessary to attain clean air by *allowing* states to include land-use and transportation controls in their implementation plans under § 110(a)(2) of the Clean Air Act. The overall scheme, however, of the Clean Air Act (federal standards for air quality and performance of new sources, with states allowed to locate sources as they wish so long as the standards are met) cuts against this interpretation, at least as applied to indirect sources and nondegradation. The heated debate on land-use bills in Congress further indicates that Congress has not yet determined federal land-use control to be desirable or necessary where the minimum air quality standards to protect public health and welfare are being met. *See* note 1, *supra*.

[370]38 Fed. Reg. 18714 (1973).

[371]*Id.*

Act are themselves longer than this article, and, as stated previously, a whole book has been written about NEPA. It is hoped that the article has served to introduce the readers to the field of environmental law and point out to them some of the new directions the field is taking.

Finally, a bright note on which to close—if *Gideon v. Wainwright*[372] had a positive effect on lawyers' caseloads, and if no-fault insurance statutes[373] are having a negative effect, then the new trends in environmental law are surely opening new fields of endeavors for the legal profession. Attorneys will be increasingly involved in the complex and difficult process of reconciling man's material needs with his equally compelling need for a clean and healthy environment.

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[372]372 U.S. 335 (1963).

[373]*See Symposium: No-Fault Automobile Insurance*, 44 Miss. L.J. (1973).

CRIMINAL DEFENSE DISCOVERY: A PRELUDE TO JUSTICE OR AN INTERLUDE FOR ABUSE?

*Paul R. Rice**

Introduction

Pretrial defense discovery in Mississippi has always rested within the broadly granted but vaguely defined discretion of trial courts.[1] Consequently, it is an unknown quantity—an amorphous area of the law—spoken of in generalities because it cannot be defined. Its scope has varied with the judge, charge, and facts of each case,[2] and with the extenuating circumstances surrounding each motion.[3] While expanded

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[1]Ladnier v. State, 273 So. 2d 169, 173 (Miss. 1973); McGraw v. State, 260 So. 2d 457, 461 (Miss. 1972); Peterson v. State, 242 So. 2d 420, 424 (Miss. 1970); Mattox v. State, 243 Miss. 402, 137 So. 2d 920, *suggestion of error overruled*, 139 So. 2d 653 (1962).

[2]Grady v. State, 274 So. 2d 141 (Miss. 1973) (prosecution for delivery of marijuana in which trial court ordered disclosure of a narcotic agent's report); Sisk v. State, 260 So. 2d 485 (Miss. 1972) (The trial court refused to order production of a "parts book" which was used at trial to identify the parts that the defendant allegedly stole and to establish their value. The Mississippi Supreme Court found error and reversed.); Dozier v. State, 257 So. 2d 857 (Miss. 1972) (sale of marijuana prosecution in which the trial court ordered the disclosure of all witnesses' names); Jackson v. State, 243 So. 2d 396 (Miss. 1971) (A defendant charged with the possession of marijuana was denied by the trial court the opportunity to examine the allegedly illegal substance. The case was reversed on the ground that the requested substance was "relevant, material, competent and in fact, necessary evidence" to the defendant's conviction.); Peterson v. State, 242 So. 2d 420 (Miss. 1970) (Despite the fact that the prosecution did not comply with the order of the trial court to make available for the defendant's inspection tangible evidence the prosecution intended to use, the trial court allowed the evidence to be introduced at trial. The supreme court found no error since there was nothing in the record to show that either the defendant or his counsel had ever requested to see the evidence after the trial court had ordered its disclosure, and it was within the discretion of the trial court to admit the withheld evidence.); Boyd v. State, 253 Miss. 98, 175 So. 2d 132 (1965) (In this homicide prosecution the trial court ordered the State to furnish the prosecution with a list of witnesses it would be calling at trial. Despite the fact that the State did not completely comply with the order, no reversible error by the trial court was found in allowing the omitted witnesses' testimony into evidence since there is no obligation on the part of the prosecution to disclose such information.); Bellow v. State, 238 Miss. 734, 106 So. 2d 146 (1958) (trial court refused to order production of statements given by State's witnesses prior to trial).

[3]Ladnier v. State, 273 So. 2d 169 (Miss. 1973) (lengthy motion for pretrial discovery was untimely when made prior to trial).

discovery may be the trend in one court or in one type of case,[4] it is the exception in another.[5]

Relatively few cases have been decided by the Mississippi Supreme Court in which the issue of pretrial defense discovery was discussed in any detail. In these few cases, the discussions generally have been quite brief and have involved a summary affirmance of the trial courts' action.[6] The degree to which pretrial discovery should be granted was never discussed by the state supreme court until 1968 in *Armstrong v. State*.[7]

Armstrong involved a murder prosecution in which the defendant's motion to inspect a list of tangible items was denied. On appeal, the Mississippi Supreme Court expressed disagreement with the denial of the motion but found the error to be harmless since it would "not have changed the course of the trial nor have influenced the verdict of the jury."[8] After reviewing the status of pretrial discovery in various jurisdictions, including Mississippi, and listing, without discussion, the leading United States Supreme Court opinions on the subject,[9] the court concluded:

> It is becoming increasingly clear from a study of the foregoing authorities that, although the trial judge has discretionary power in determining whether or not tangible evidence in the possession or under the control of the prosecuting attorney should be given to the defendant for his inspection, nevertheless, the defendant should be permitted to inspect tangible evidence which may be useful in his defense. This does not mean that a defendant may peruse the private files of a prosecuting attorney or examine his private notes. It does mean, however, that the concept of "due process" and "fair trial" requires that material, tangible evidence must not be concealed from the defendant who is accused of crime. There is no good reason why the defendant in a civil case should be entitled to more liberal right to tangible evidence in the possession of his adversary under the authority of section 1659, Mississippi Code 1942 Annotated (1956) [Section 11-1-51 of the Mississippi Code Annotated of 1972] than is a person under a serious criminal charge.[10]

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[4]*See, e.g., narcotic prosecutions*, Grady v. State, 274 So. 2d 141 (Miss. 1973); Dozier v. State, 257 So. 2d 851 (Miss. 1972); Jackson v. State, 243 So. 2d 396 (Miss. 1971); and *homicide prosecutions*, Peterson v. State, 242 So. 2d 420 (Miss. 1970); Boyd v. State, 253 Miss. 98, 175 So. 2d 132 (1965).

[5]*See, e.g.*, Sisk v. State, 260 So. 2d 485 (Miss. 1972).

[6]*E.g.*, Grady v. State, 274 So. 2d 141 (Miss. 1973); Dozier v. State, 257 So. 2d 857 (Miss. 1972); Peterson v. State, 242 So. 2d 420 (Miss. 1970); Boyd v. State, 253 Miss. 98, 175 So. 2d 132 (1965).

[7]214 So. 2d 589 (Miss. 1968).

[8]*Id.* at 597.

[9]*Id.* at 596.

[10]*Id.*

It is not clear from the opinion why the discussion was limited to "tangible" items, or how broad this concept of "tangible" was intended to be; *i.e.*, whether it included the names and written statements of witnesses discovered by the State.[11] It is also unclear whether the conclusions of the court about discovery in general were based primarily on its interpretation of the federal requirements of due process of law enunciated in *Brady v. Maryland*,[12] the court's own conviction about the appropriate scope of pretrial discovery aside from constitutional requirements, or Section 11-1-51 of the Mississippi Code of 1972. In subsequent opinions in which limited discovery has been ordered, the court has offered no indication of the basis for its liberal discussion of discovery in *Armstrong*.[13]

As a constitutional decision, *Armstrong* appears to represent an expansive interpretation of the *Brady* disclosure requirements as they relate to tangible evidence. The court's refusal to reverse Armstrong's conviction on the ground that the withheld evidence "would not have changed the course of the trial," however, effectively nullified the liberal rights which the court appeared to have recognized. Consequently, *Armstrong* is in line with the most recent pronouncement of the United

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[11]In the subsequent case of Peterson v. State, 242 So. 2d 420 (Miss. 1970), the court spoke of the term "tangible" as if it were synonymous with "physical" evidence. The court stated: "The discovery rule is directed toward physical evidence in the possession of the prosecution . . . ." *Id.* at 424. Both *Armstrong* and *Peterson* leave open the question of whether the "tangible" or "physical" evidence which is not exculpatory, and therefore not under the *Brady* disclosure requirement, must be admissible in order to be discoverable. Several states have established this as a requirement. *See* Annot., 7 A.L.R.3d 8, 75 (1966).

[12]373 U.S. 83 (1963).

[13]In Jackson v. State, 243 So. 2d 396 (Miss. 1970), the Mississippi Supreme Court ordered disclosure prior to trial of a substance alleged to be marijuana which the defendant was charged with having possessed. Its decision was based on the crucial nature of the evidence to the prosecution's case. Explaining its decision, the court stated:

> This substance was relevant, material, competent and, in fact, necessary evidence to defendant's conviction. Under this circumstance we are of the opinion that due process of law requires, upon the court's attention being directed thereto by motion, that the analysis of the substance not be left totally within the province of the state chemist. The defendant having made proper and timely motion for a portion of the substance, it should have been made available to his attorney, as an officer of the court, and under such safeguards as the trial court deemed necessary, for inspection and analysis. We hasten to add that this opinion is limited to the alleged possession or sale of a prohibited substance where the outcome of the case is dependent upon its identification as contraband.

Id. at 398. Although the court expressly based its decision on principles of due process of law, the order was so limited that it gave no indication of what the more expansive discovery discussed in *Armstrong* was based upon or whether that expansive discovery was still available.

States Supreme Court on the constitutional right to pretrial defense discovery.[14]

I. The Birth and Demise of a Right

In *Brady v. Maryland*[15] the Supreme Court recognized, for the first time, a due process right to pretrial defense discovery. The Court held that:

> suppression by the prosecution of evidence *favorable* to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.[16]

Brady involved a pretrial discovery order only partially complied with by the state. Contrary to the order of the trial court, the prosecution did not disclose all the statements given to it by Brady's codefendant. The one statement in which it was admitted that the codefendant, rather than Brady, was the triggerman in the killing was concealed. Although this fact would not have absolved Brady of guilt, the Supreme Court found that it would have been material to the jury's decision to recommend mercy—both Brady and his friend were sentenced to death—and therefore remanded the case to the trial court for resentencing.

Beyond the statement of the exculpatory evidence rule, the concept of "materiality" was not defined. Two conflicting interpretations, however, were offered by Justices Fortas and Harlan in the subsequent case of *Giles v. Maryland*.[17]

Similar to *Brady*, *Giles* involved an intentional suppression of evidence by the State. Here, however, the evidence went to the credibility of the prosecutrix rather than the culpability of the defendant.[18] Ex-

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[14]Moore v. Illinois, 408 U.S. 786 (1972).

[15]373 U.S. 83 (1963).

[16]*Id.* at 87 (emphasis added).

[17]386 U.S. 66 (1967).

[18]Giles, with two codefendants, was convicted of the rape of a 16-year-old girl. The unsuccessful defense which he asserted was consent by the girl. During the trial the state concealed the following evidence: (1) When interviewed by the police in relation to the charge made against Giles, she gave a statement about the participation of Giles which was contradictory to her testimony at trial. In the interview, she claimed to have had sexual intercourse with only the other defendants, and she said that Giles "could not get" an erection and did not "insert" [penetrate her]. (2) One month prior to the alleged rape, a juvenile court case-worker had recommended that the girl be placed on probation because she was "beyond parental control." The evidence may have supported the testimony of the defendants that the prosecutrix had told them that if they were caught she would have to claim that she had been raped since "she was on a year's probation." (3) Five weeks after the alleged rape by Giles and his codefendants, the girl had sexual relations

pressing diametric interpretations of the *Brady* disclosure requirement, Justice Fortas concurred with, and Justice Harlan dissented from the majority decision to remand the case to the trial court for a determination of the materiality of newly discovered suppressed evidence.

Justice Fortas' position was that prosecuting officials must disclose any information "which is material, generously conceived, to the case, including all possible defenses."[19] This also would include all information which is "helpful." Justice Harlan, on the other hand, saw *Brady* as requiring no more than had been required prior to *Brady*;[20] that is, the State must not use perjured testimony, either deliberately[21] or through acquiescence,[22] and allow it to go uncorrected.

Justice Harlan expressed the view that due process was only concerned with avoiding those kinds of prosecutorial conduct which "vitiate the very basis of our adversary system."[23] He believed that the Constitution stopped short of a "broad" disclosure requirement. Justice Fortas, however, saw this position as perpetuating the criminal trial as a "game in which the State's function is to out wit and entrap its quarry."[24] To him, the duty of the state to pursue justice rather than a victim requires the state to voluntarily disclose evidence which it has in its exclusive possession and which may exonerate the defendant or be of material importance to the defense. He argued that "a supportable conviction requires something more than that the State did not lie. It implies that the prosecution . . . has disclosed all information known to it which may have a crucial or important effect on the outcome."[25]

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with two men after which she again alleged that she had been raped and then later denied the allegation. (4) Following the second alleged rape, the girl attempted to commit suicide by taking an overdose of drugs and was committed for psychiatric treatment. (5) During the investigation of the second alleged rape, the prosecutrix admitted that she had had sexual relations with numerous unknown males over the prior 2 years. (6) Following the girl's release from the hospital, she was incarcerated by juvenile authorities after it was adjudicated that she was "out of parental control and living in circumstances endangering her well-being." (7) A concealed police report showed that the prosecutrix and a male companion, who was with her on the night of the alleged rape, had made statements to the police concerning their sexual activities which were contradictory to their testimony at trial. In the report they admitted that they were engaged in sexual intercourse when approached by the defendants. At trial they denied having sexual relations that night. The concealed police report was uncovered by the Supreme Court when it requested the State to supply it with the materials considered by the judge at sentencing. *Id.* at 74-80.

[19] *Id.* at 98 (Fortas, J., concurring).

[20] *Id.* at 116 (Harlan, J., dissenting).

[21] Mooney v. Holohan, 294 U.S. 103 (1935).

[22] Alcorta v. Texas, 355 U.S. 28 (1967); Napue v. Illinois, 360 U.S. 264 (1959).

[23] 386 U.S. at 117.

[24] *Id.* at 100 (Fortas, J., concurring).

[25] *Id.* at 101.

Neither position has been adopted by the Court. In its recent opinion in *Moore v. Illinois*,[26] however, the Court may have indirectly rejected Justice Harlan's view by addressing itself to the problem of "materiality" beyond the point of prosecutorial acquiescence in the use of perjured testimony. No basis for relief, however, was found.

In *Moore* the prosecution failed to disclose to the defense evidence which reflected disfavorably on the accuracy of identification testimony. The state's case chiefly consisted of eyewitness identifications by Hill and Powell, and an identification by a corroborating witness, Sanders, who claimed to have heard Moore bragging about having shot a bartender. The prosecution failed to disclose to the defense a statement by Sanders to the police in which Sanders identified Moore as one named "Slick" and other evidence which clearly proved that Moore was not that person. Also concealed was a diagram given to the police by a patron of the bar where the homicide occurred. The diagram illustrated that Powell was seated at a card table in such a position as to block his view of the front door and the site of the shooting.

The undisclosed evidence was clearly "favorable" to the accused under the *Brady* disclosure rule, and under Fortas' generous conception of "materiality" would have amounted to reversible error. The Court, however, though willing to find a disclosure duty beyond that found in pre-*Brady* cases, was not willing to be so generous in its conception of what is "material."[27]

The Court characterized the nondisclosure of Sanders' misidentification of Moore as "insignificant" for two reasons: other witnesses confirmed the fact that Moore, although not "Slick," was the man who had made incriminating statements; and the identification of Moore by the two eyewitnesses was unshaken.[28] The diagram was not material since it was not intended to illustrate how Powell was seated at the time of the shooting and since Powell had testified that just before the incident he had laid his cards down and was looking toward the door when the defendant entered.[29]

The Court concluded that since none of the suppressed evidence would have "altered the outcome" of the trial, it was not "material" and therefore not reversible error. Rather than define the concept of "materiality," the Court translated it into a harmless error type standard under which a determination must be made of the probable impact of the withheld evidence on the outcome of the trial.[30]

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[26]408 U.S. 786 (1972).

[27]*Id.* at 794-97.

[28]*Id.* at 798.

[29]*Id.* at 797-98.

[30]*See* Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

The doctrine of harmless error emerged in *Chapman v. California*[31] with regard to constitutionally inadmissible evidence. It allowed the use of such evidence to be overlooked when the appellate court finds beyond a reasonable doubt that the illegal evidence did not contribute to the conviction.[32] Whether the doctrine of harmless error can reasonably be transposed from a *Chapman*-type evidentiary use situation to a *Moore*-type evidentiary concealment situation is questionable because of a major distinction between the two. In the evidentiary use situation the evidence to be measured in terms of impact on the jury is apparent because the evidence has been used. In the evidentiary concealment situation this is not necessarily the case. Usually, a reasonable after-the-fact determination of the probable impact of concealed evidence can be measured only by the effect which the nondisclosure had on defense preparation. The direct effect which the withheld evidence may have had on the jury does not always reflect its true value. This value may be determined only with knowledge of the evidence that was not found and used, of the witnesses who were not discovered and called, and of the strategy that was not devised and employed—none of which appear in any record, and about which the courts are therefore compelled to speculate. Based on this speculation, the appellate courts are required to speculate further about the probable impact the withheld evidence would have had on the jury had the evidence been used and therefore on the outcome of the trial.

The doctrine's inherently difficult application in *Chapman* evidentiary use situations[33] is compounded in transposition. The required speculation upon speculation in the evidentiary concealment situations prevents any degree of accuracy in review, thereby destroying the review's effectiveness as a guide to pretrial prosecutorial disclosure. Consequently, constitutional rights are diminished through their violation which is overlooked.

Given this inaccuracy in determining the possible effects of the nondisclosures on trial preparation, the courts will have to resort to a facial harmless error standard. If on its face it appears that the suppressed evidence would not have altered the outcome of the trial, then the suppression is not material and therefore is harmless. Despite such a limitation of the inquiry to the immediate effects of the concealed evidence, the courts cannot realistically determine what the response of each juror would have been to it. Appellate judges are instead reviewing

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[31]386 U.S. 18 (1967).

[32]In determining the possible impact of the tainted evidence on the jury, the court may look to the quantity and quality of the untainted evidence. Milton v. Wainwright, 407 U.S. 371 (1972); Harrington v. California, 395 U.S. 250 (1969).

[33]*See, e.g.*, cases cited note 32 *supra*.

on the basis of their own personal beliefs or convictions, and the "materiality" standard is nothing more than an after-the-fact determination of guilt.[34] After reviewing the concealed evidence, if a majority of the court believes that the defendant is guilty beyond a reasonable doubt, they assume that a jury would come to the same "reasonable" conclusion and that the concealment was therefore harmless.

Although this standard of review may be desirable from the perspective of appellate judges since it paves a much smoother path of review, its results are quite undesirable, not only because they are unrealistic, but also because they provide virtually no standard for pretrial prosecutorial disclosure and offer absolutely no encouragement of conscientious disclosure with the needs of the defendant in mind.

The discussion of the standard of "materiality" by the Mississippi Supreme Court in *Armstrong* concentrated on the concept of "favorable" as employed in the *Brady* ruling. In *Brady*, only the suppression of "material" evidence "favorable" to the accused was held by the United States Supreme Court to violate due process of law. Through an expansive interpretation of this concept of "favorable," Mississippi appeared to expand discovery rights to tangible evidence far beyond even that which Justice Fortas envisioned in *Giles*. In addition to tangible evidence which "may be useful" in the preparation of a defense, *Armstrong* also encouraged disclosure of tangible evidence "which may be used *against*" the defendant.[35]

Although Fortas recognized in his concurrence in *Giles* that expanded pretrial discovery is desirable, and that knowledge of inculpatory as well as exculpatory evidence would certainly be "favorable" in the sense that the defendant could better prepare for trial knowing the State's entire case against him, he conceded that there is no constitutional obligation of the State to make such disclosures. In his response to the barbs of Justice Harlan, he wrote:

> My point relates, not to the defendant's discovery of the prosecution's case for purposes of preparation of avoidance of surprise . . . but with the State's constitutional duty as I see it, voluntarily to disclose material in its exclusive possession which is exonerative or helpful to the defense—*which the State will not affirmatively use to prove guilt*—and which it should not conceal.[36]

In the *Armstrong* opinion, the Mississippi Supreme Court treated "materiality" as encompassing evidence that was not only favorable in the first sense—affirmatively tending to show a lack of guilt or less

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[34]*See* Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 128 (1972).

[35]Armstrong v. State, 214 So. 2d 589, 596-97 (Miss. 1968) (emphasis added).

[36]Giles v. Maryland, 386 U.S. 66, 101-02 (1967) (Fortas, J., concurring) (emphasis added).

culpability—but favorable in the sense that knowledge of it would enhance the defendant's adversarial position. Regardless of how broadly the court seemed to view the concept of "materiality," however, this expansion of the *Brady* rule was in appearance only. By failing to find reversible error because the concealed evidence "could not have changed the course of the trial,"[37] the court employed the same restrictive standard that effectively limited disclosure requirements in *Moore*. Practically, therefore, the discussion in *Armstrong* of the degree to which pretrial discovery should be granted established neither a constitutional nor a statutory right—it was instructive, not directive. The broad discretion of the trial court is still controlling, limited only by the virtually unlimiting standard of due process of law. This is unfortunate. Discretionary discovery necessarily will give rise to gross inconsistencies among the various judicial districts since each decision must be made pragmatically on the basis of each trial judge's evaluation of the merits of the arguments advanced in the discovery debate and his conception of what is sufficiently "material"[38] to justify the exercising of his discre-

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[37]214 So. 2d at 597.

[38]"Materiality" is a nebulous standard which will vary with the nature of each item requested and the circumstances of the case in which the request is made. It will also vary according to the stringency of the standard envisioned by each judge. Some equate "materiality" with "relevancy" and permit discovery so long as the items *may* lead to further evidence which will be useful at trial. This has been the experience in federal courts. *See* Nakell, *Criminal Discovery For the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C.L. Rev. 437, 439, 475 (1972). Others equate "materiality" with "admissibility" and require that each item requested be directly admissible at trial. The latter view was adopted in many earlier state court opinions. *See* Annot., 7 A.L.R.3d 8, 75 (1966). The less restrictive view is the better one since the issue of admissibility has little relevance to the policy of discovery—adequate defense preparation.

The materiality of certain items to the preparation of a defense has been held to be self-evident under Rule 16 of the Federal Rules of Criminal Procedure. *E.g.*, United States v. Dioguardi, 332 F. Supp. 7 (S.D.N.Y. 1971). For this reason Proposed Rule 16 dispenses with a showing of materiality before obtaining disclosure of such items as a defendant's own written or recorded statements or confessions, his own prior criminal record, results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the case, the transcript of the defendant's testimony before the grand jury, and a written list of the names and addresses of all witnesses the government intends to call in its case in chief. Fed. R. Crim. P. Amended, 42 U.S.L.W. 4551, 4555 (April 23, 1974).

Under the present Federal Rule, if documents in the possession of the government are too numerous for the defendant to identify, a showing of materiality is unnecessary since it would be impossible. United States v. Greater Blouse, Skirt & Neckwear Contractors' Ass'n, 177 F. Supp. 213 (S.D.N.Y. 1959). *See generally* R. Cipes, 8 Moore's Federal Practice ¶ 16.05[4] (2d ed. J. Moore 1974). If the materials sought are to be used against the accused, it has been held that they are automatically "material" and that requests for their production are "reasonable." United States v. Hrubik, 280 F. Supp. 481 (D. Alaska 1968); United States v. Aadal, 280 F. Supp. 859, 861 (S.D.N.Y. 1967); United

tion. With the hope of minimizing these inevitable inconsistencies by demonstrating the lack of justification for restricting discovery practices, the remainder of this article will be devoted to the discovery debate.

II. The Debate

The pretrial discovery debate has centered on the dire forecasts that discovery would constitute a modern day Trojan horse within the gates of justice. Chief among the claims by opponents of discovery have been: (1) that discovery would lead to perjury and the suppression of evidence; (2)that it would promote the intimidation of witnesses; (3) that it would give an unfair advantage to criminal defendants since there is no reciprocal right for the prosecution; and (4) that it would require the prosecution to disclose its privileged work product.

None of these claims has been empirically tested. Rather, they appear to rest upon misconceived intuitive concepts of the "normal" conduct of all criminal defendants and upon an unenlightened gamesmanship theory of criminal justice. Although some of the claims may have justification in individual cases, they have never been substantiated as a genuine cause for alarm. Courts are reluctant to grant the requests of proponents, however, because of the proponents' inability to substantiate denials to the opponents' claims, because of the sheer gravity of the problems forecast, and because of the certainty with which those forecasts have been made. But the fervor of conviction can no longer carry the day. Both experience with defense discovery and logical analysis of the claims asserted disclose that the horrors of Pandora's box are not released by the granting of pretrial defense discovery but rather by its denial.

A. Perjury and the Destruction of Evidence

The most frequently cited statement for the argument that discovery will lead to perjury and the suppression of evidence appears in *State v. Tune*, a 1953 New Jersey case:[39]

States v. Tanner, 279 F. Supp. 457 (N.D. Ill. 1967). *See generally* Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276, 1279 (1966). A particular showing of materiality with regards to all items sought has also been excused when the government has had exclusive possession of the items sought and their contents cannot precisely be known. United States v. Dioguardi, 332 F. Supp. 7 (S.D.N.Y. 1971); United States v. Telles, 226 F. Supp. 670 (N.D. Cal. 1964).

If an affirmative showing of materiality is found to be necessary, regardless of the nature of the items sought, mere conclusory allegations of materiality by counsel have been held insufficient. Counsel must give the basis for his conclusion. United States v. Conder, 423 F.2d 904 (6th Cir. 1970); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971); United States v. Cobb, 271 F. Supp. 159, 162 (S.D.N.Y. 1967).

[39]13 N.J. 203, 98 A.2d 881 (1953).

> In criminal proceedings long experience has taught the courts that often discovery will not lead to honest factfinding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense . . . . All these dangers are more inherent in criminal proceedings where the defendant has much more at stake, often his own life, than in civil proceedings. The presence of perjury in criminal proceedings today is extensive despite the efforts of the courts to eradicate it and constitutes a very serious threat to the administration of criminal justice and thus to the welfare of the country as a whole . . . . To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice.[40]

It is argued that the success of discovery in civil litigation, in the sense that there has been no appreciable increase in perjury,[41] is not indicative of the probable success of discovery in criminal cases for two significant reasons. First, in civil litigation discovery is equally available to both sides, thus allowing each litigant to "pin-down" the other's story and the stories of their witnesses; in criminal cases with the fifth amendment restrictions on extended discovery by the state, the defendant is, to some extent, left free to make his defense "fairly or foully."[42] Second, penalties in criminal cases may involve much more than just money and property, thereby making the dangers of perjury and witness intimidation more formidable.[43]

These dire predictions are disputed by experience with broad pretrial disclosure, whether through formal experiments[44] or informal open-file practices by prosecuting officials.[45] In fact, disclosure has

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[40]*Id.* at 210-11, 98 A.2d at 884.

[41]Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 290; Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 308 (1960).

[42]Moore, *Criminal Discovery*, 19 HAST. L.J. 865 (1968); *see* United States v. Garsson, 291 F. 646 (S.D.N.Y. 1923). The United States Supreme Court has recently held that discovery against the defendant does not violate the fifth amendment privilege against self-incrimination. Williams v. Florida, 399 U.S. 78 (1970).

[43]United States v. Louis Carreau, Inc., 42 F.R.D. 408, 413-14 (S.D.N.Y. 1967); State v. Tune, 13 N.J. 203, 98 A.2d 881, 884 (1953); *Discovery in Federal Criminal Cases—A Symposium*, 33 F.R.D. 47, 78 (1963).

[44]Langrock, *Vermont's Experience in Criminal Discovery*, 53 A.B.A.J. 732 (1967); Miller, *The Omnibus Hearing—An Experiment in Federal Criminal Discovery*, 5 SAN DIEGO L. REV. 293 (1968).

[45]Informal disclosure is practiced in varying degrees throughout the country by prosecuting officials. *See, e.g., Discovery in Criminal Cases—A Panel Discussion*, 44 F.R.D. 481, 497-98 (1968); *Discovery in Federal Criminal Cases—A Symposium*, 33 F.R.D. 47, 85, 94 (1963). It is often necessary during the plea negotiations which have become an integral part of the criminal justice system in many jurisdictions. Note, *Guilty Plea Bargaining:*

brought about favorable results which have furthered, rather than defeated, the ends of justice. It has decreased the likelihood of trial and therefore the opportunity for perjury because defendants were able to find from knowledge rather than conjecture what the state's case consisted of, thereby removing the element of bluffing and encouraging both sides to bargain for a satisfactory solution.

This same experience also disputes the predictions that evidence will be altered or destroyed. For several reasons the prediction of evidence-tampering has been unrealistic. Many items of evidence, such as confessions and other written or printed documents, such as photographs, are disclosed for inspection only through copies. Consequently, no greater opportunity for the destruction or suppression of evidence is afforded than without discovery.[46] If the evidence is of such a nature that the original must be produced for purposes of testing or analysis, the state usually runs its tests beforehand. Where testing or analysis is not required, defense counsel can be compelled to inspect the items in the presence of a prosecutor or court clerk. But even when the items must be taken physically from the presence of an agent of the state, they will be given to the defense attorney and not the defendant. Consequently, the defendant may not have personal contact with the items. If he remains incarcerated this will certainly be true. When the defendant does come in contact with the items, any alterations would have to be made either in the presence of his counsel or with his counsel's knowledge, and counsel would certainly be reluctant either to be a participant or have it appear as though he is one.[47] Finally, the admission which can be inferred from the destruction or alteration of such evidence is a sub-

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Compromises By Prosecutors to Secure Guilty Pleas, 112 U. PA. L. REV. 865 (1964); *see* Brady v. United States, 397 U.S. 742 (1970). The very fact that informal disclosure policies continue to be followed is some indication that the fear of manufactured evidence is not widespread among prosecutorial officials and that the advantages to be gained from the disclosures outweigh the possible abuses that might result.

[46]*See* Krantz, *Pretrial Discovery in Criminal Cases: A Necessity For Fair and Impartial Justice*, 42 NEB. L. REV. 127, 134 (1962); *Developments In the Law—Discovery*, 74 HARV. L. REV. 940, 1063 (1961).

[47]The presence of defense counsel may also serve to guard against the horrors forecast by discovery opponents. Defense counsel invariably has interviewed his client prior to discovery and will frequently be aware of any deception which is practiced on the court. Consequently, as an officer of the court, he may be compelled either to disclose the unlawful act, ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1970), or withdraw as legal counsel, Brennan, *supra* note 41, at 291-92; Moore, *supra* note 42, at 875. *But see* Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493 (1966); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966).

stantial deterrent to an accused, even if the opportunity presented itself.[48]

This entire argument of perjury and destruction not only assumes that all defendants are guilty and therefore in need of perjured testimony, but also that most of these "guilty" defendants are prepared to participate in such activities. Neither assumption is based upon demonstrable fact. But even if we presume, for discovery purposes, that most defendants are guilty and are prone to commit perjury, it is inconsistent not to presume also that most of them would commit perjury without discovery. Consequently, denying discovery serves largely to punish the innocent defendants who are in need of information.

Undoubtedly, expanded discovery would result in some increase in the quality, if not quantity, of perjured testimony, and this would obviously tend to weaken the truth-seeking process. But an increase in both the quality and quantity of truthful evidence is equally certain. Therefore, the merit of the argument is reduced to weighing abstract benefits against abstract harm. Unfortunately, we have no basis upon which to project the possible increases in perjury (quantitatively or qualitatively) and have no way of evaluating the ability of our adversarial system to cope with such increases if they could be foreseen. This is why one Justice has called the suggestion of perjury an "old hobgoblin"[49] and another has discounted the prediction as a bugaboo which is "built one-sidedly of untested folklore."[50]

B. Witness Intimidation

The claim most frequently made by opponents of defense discovery is that witness intimidation or elimination will result.[51] Although the

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[48]See J. McCORMICK, EVIDENCE § 273, at 660 (E. Cleary 2d ed. 1972); 2 J. WIGMORE, EVIDENCE §§ 278, 291 (1940); *see, e.g.*, Hubbard v. State, 187 So. 2d 885 (Miss. 1966). *See generally*, Moore, *Criminal Discovery*, 19 HAST. L.J. 865, 876 (1968).

[49]State v. Tune, 13 N.J. 203, 227, 98 A.2d 881, 894 (1953) (Brennan, J., dissenting).

[50]United States v. Projanski, 44 F.R.D. 550, 556 (S.D.N.Y. 1968) (Frankel, J.).

[51]The most frequently quoted statement of this objection is by Justice Vanderbilt in *State v. Tune*:

> Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime . . . .

13 N.J. 203, 210, 98 A.2d 881, 884 (1953). *See also Discovery in Criminal Cases—A Panel Discussion*, 44 F.R.D. 481, 483 (1968), wherein it was shown that this constitutes the most serious concern of prosecutors with expanded defense discovery.

elimination of witnesses may not pose a serious problem in the run-of-the-mill criminal case, there may be some justification for believing that more subtle forms of persuasion are being employed. The degree and pervasiveness of the practice and the types of cases in which witnesses are intimidated are open to conjecture.[52] But even if our questions could be answered, and the practice were shown to be extensive, there would be no justification for denying all requests for discovery. "Witness discovery," the discovery of their names and statements, is the most that should be affected by such knowledge.[53] Present speculation, however,

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[52]Professor Louisell has expressed the view that witness intimidation is characteristic only of cases involving organized crime or professional criminals. He suggests that intimidation is virtually nonexistent in the "run-of-the-mill" state court case. In his view discovery should be limited only when the state shows that it would likely be used improperly. Louisell, *Criminal Discovery: Dilemma, Real or Apparent?*, 49 CAL. L. REV. 56, 100 (1961). Requiring the state to make such a showing, however, may defeat the very purpose for the objection. As stated by Jon O. Newman at the Judicial Conference of the Second Circuit in 1967: "Arguing the issue to the judge poses problems because it is precisely in a case where you fear witness intimidation that you are most reluctant to come into court and argue the point—because to explain why you are fearful, is very likely to disclose the very information that will subject your witnesses to danger." *Discovery in Criminal Cases—A Panel Discussion*, 44 F.R.D. 481, 499 (1968). Mr. Newman, therefore, would let the prosecution decide whether witness intimidation is likely to occur. He would prefer to risk the possibility of an abuse by the prosecution than the injuries which may result to witnesses. This risk of prosecutorial abuse, however, is unnecessary since the entire matter could be effectively handled by the judge *in camera*, as is provided for in Rule 16(e) of the Federal Rules of Criminal Procedure.

Moore's Federal Practice has taken the position that "[i]n many, if not most cases, . . . the witness subject to reprisal is not the ordinary witness who accidentally finds himself a victim or a viewer of a criminal act." 8 R. CIPES, MOORE'S FEDERAL PRACTICE ¶ 16.02[1], at 16-13 (2d ed. J. Moore 1974). It is asserted that:

> The threatened witness is often an informer who, with active encouragement of the police, has dealt with the underworld for the very purpose of making a case. Or he may be a more casual informant, ready to sell miscellaneous information to the police. The solicitude of the police for the safety of the informant is less a concern for the individual than for a system of detection in which he is deemed indispensible. Police agencies dependent on maintaining a network of informers as a prime source of information cannot afford the reputation for a high rate of informer-mortality.

Id. If this position is correct, then the protection which the informant's name is given, Branzburg v. Hayes, 408 U.S. 665 (1972); Smith v. Illinois, 390 U.S. 129, 131 (1968); Roviaro v. United States, 353 U.S. 53 (1957), destroys the concern of intimidation as a justification for generally denying pretrial discovery for the ordinary witness.

[53]It is argued that pretrial "witness discovery" is essential to the ascertainment of truth at trial because without it the defendant cannot effectively cross-examine the state's witnesses.

> The cross-examiner has many weapons at his disposal: the development of inconsistencies in the witness' testimony, the establishment of contradictions between the testimony of the witness and the testimony of others, and the impeachment of the witness through the use of prior inconsistent statements,

justifies no general denial, "witness" or otherwise. Pretrial discovery should be limited on a case-by-case basis only in so far as the state can demonstrate a significant threat of intimidation.[54]

This prediction of witness intimidation, like the prediction of perjury and destruction of evidence, unfairly presumes guilt, a general predisposition on the part of defendants to do anything necessary to prevent a conviction, and an inability of existing laws against witness intimidation to deter such conduct. As with the prediction of perjury, this prediction, with respect to crimes that have been reported, is not supported in fact. If it were, a substantial problem would presently exist in all jurisdictions due to the knowledge which many guilty defendants have of the identification of prospective state's witnesses, and especially in those jurisdictions which require such disclosures to be made.[55] After a crime has been reported, intimidation would normally seem to arise only in cases involving serious offenses where the risk of conviction is substantial since there would exist the likelihood of further punishment from revelation of the threats.

A recent study of five of our nation's largest cities has revealed that although a large percentage of crimes went unreported—50 percent on the average—a maximum of only one or two percent of the nondisclosures were attributable to a fear of reprisal.[56] And this small figure does

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proof of bias, or proof of prior convictions. Effective cross-examination without broad discovery is frequently impossible except in the unusual case where the defendant is sufficiently wealthy to hire private investigators. It is extremely difficult to develop inconsistencies or to effectively impeach any witness whose identification is unknown until he is sworn or until his name is divulged during voir dire.

Discovery in Federal Criminal Cases—A Symposium, 33 F.R.D. 47, 83 (1964); *cf.* Alford v. United States, 282 U.S. 687 (1931), where the issue before the Court was the improper limitation of cross-examination by the trial court. The Court stated that it is important to identify the prosecuting witness with his community

> so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood . . . ; that the jury may interpret his testimony in light reflected upon it by knowledge of his environment . . . ; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue and biased.

Id. at 691-92.

[54]*See, e.g.*, FED. R. CRIM. P. 16(e):

> Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. . . .

[55]Very few jurisdictions have allowed discovery of witnesses' statements. *See* Annot., 7 A.L.R.3d 8, 122-29 (1966). Many more will allow discovery of witnesses' names. *See* 8 R. CIPES, MOORE'S FEDERAL PRACTICE ¶ 16, app., at 16-134 (2d ed. J. Moore 1974).

[56]NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, LAW ENFORCEMENT

not reflect the percentage of cases in which nondisclosures were the product of actual threats. Then, of course, it must be realized that there is not a necessary correlation between the incidents of prereporting intimidation, where the object is to prevent disclosure, and postreporting intimidation, where the object is to avoid conviction. As stated previously, after exposure of the original crime, the incidents of intimidation would naturally decrease since the likelihood of detection and conviction for the threats themselves would substantially increase. Even though good judgment would not seem to be one of a criminal's more common attributes, the need for circumspection would seem to be apparent to those with even the least discretion. A general denial of discovery because of a fear that witnesses will be intimidated appears therefore to give the problem a disproportionate effect. Admittedly, the problem cannot be ignored. Its effect, however, must be held within reasonable bounds and limited to those cases in which justification for the fear of intimidation is demonstrated by the state.

It is also claimed that if the identification of witnesses was revealed prior to trial, they would become even more reluctant than at present to report crimes and come forward with information during the investigation.[57] Even if the incidents of intimidation after exposure are relatively few, an increased reluctance to come forward could result, but only insofar as laymen presently believe that their names are not being disclosed, and, without factual basis, would fear reprisals upon being made aware of the change in formal policy. Although skepticism is no more persuasive than the factually unsubstantiated premises upon which the claim itself is based, personal experience makes it difficult for this writer to believe that more than a few lay witnesses[58] presently hold

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ASSISTANCE ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE, ADVANCE REPORT ON CRIME IN THE NATION'S FIVE LARGEST CITIES, NATIONAL CRIME PANEL SURVEYS OF CHICAGO, DETROIT, LOS ANGELES, NEW YORK AND PHILADELPHIA 5 (1974).

The following is a percentage distribution of reasons advanced for not reporting personal and household victimizations:

	Personal	Household
Nothing could be done; lack of proof	34 percent	37 percent
Not important enough	28	31
Police would not want to be bothered	8	9
Too inconvenient	5	4
Private or personal matter	4	3
Afraid of reprisal	2	1
Reported to someone else	7	3
Other or not available	12	12

[57] See note 51 *supra*.

[58] The term "lay witnesses" must be distinguished from police informants whose ident-

the belief that they remain anonymous until trial in any criminal case. It is equally difficult to believe that many laymen would be informed of, or if informed would take notice of, any change in a policy which they cannot anticipate will affect them. And if most laymen report crimes believing that they will not remain anonymous, informing them that their assumption is now correct probably will not prompt them to respond differently.

Intimidation appears to be primarily a problem of crime detection upon which pretrial witness discovery should have little impact. The absence of cases concerning intimidation of witnesses in those jurisdictions where witness discovery is required or where their identity is otherwise known indicates this lack of impact. What impact such intimidation may have, however, does not outweigh the need of the innocent to be able effectively to confront and cross-examine their accusers.[59]

C. *The Reciprocity Objection*

All criminal defendants are protected from conviction unless proven guilty beyond a reasonable doubt,[60] cannot be compelled to testify against themselves,[61] and generally must be found guilty by a unanimous jury.[62] It is suggested that the existence of these rights creates an "advantage" for the defendant and that this advantage should not be increased by the disclosure of the state's case while the defendant is allowed to maintain the element of surprise at trial. As Judge Learned Hand stated in *United States v. Garsson*:[63]

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted where there is the least doubt in

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ity has always been concealed according to their expectations. Their continued anonymity has been assured by the United States Supreme Court. Branzburg v. Hayes, 408 U.S. 665 (1972); Smith v. Illinois, 390 U.S. 129 (1968); Roviaro v. United States, 353 U.S. 53 (1957).

[59]Search of both primary and secondary authority has failed to disclose any significant problem in any jurisdiction with witness intimidation.

[60]Speiser v. Randall, 357 U.S. 513 (1958). *See also In re* Winship, 397 U.S. 358 (1970).

[61]Malloy v. Hogan, 378 U.S. 1 (1964).

[62]Duncan v. Louisiana, 391 U.S. 145 (1968). Although the United States Supreme Court has recently held that a less-than-unanimous jury verdict in criminal cases is consistent with the reasonable doubt standard and therefore does not violate the standards of due process of law, Johnson v. Louisiana, 406 U.S. 356 (1972), most states continue to require unanimous verdicts. Three states allow majority verdicts in criminal cases which do not involve felony charges: Idaho, Montana, and Oklahoma. Louisiana and Oregon allow such verdicts in all cases not involving the death penalty. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 461 n.6 (1966).

[63]291 F. 646 (S.D.N.Y. 1923).

> the mind of anyone of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see . . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime.[64]

This argument has emotional appeal. Upon critical analysis, however, the premise upon which it is based; *i.e.*, that criminal defendants have an "advantage" and that such "advantage" has some relevance to the question of whether discovery should be allowed, is seen to have no validity.

Because most criminal defendants are of limited financial means,[65] the "advantage" spoken of by Judge Hand is, to say the least, exaggerated in light of the state's investigative facilities[66] which invariably have been at work gathering evidence long before defense counsel has entered the case. And in the process of investigation, the state, unlike the defendant, has the right, upon a showing of probable cause, to search private property for evidence to be used against the accused.[67] It also has power to compel witnesses to appear before a grand jury to give sworn statements which only the state can use in preparation for trial.[68] The state can also gain access to evidence which would not otherwise be available by granting prospective witnesses immunity from prosecution.[69] In addi-

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[64]*Id.* at 649.

[65]The concept of "indigency" or "poverty" is an elusive one which is difficult to define. REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 7-8 (1963). Estimates are that 55 to 62 percent of all defendants are indigent. D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 83 (1968) (55 percent of all defendants in Cook County, Illinois); Kasmar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1 (1963) (62 percent of all defendants studied); *see* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 18 (1963).

[66]Goldstein, *The State and the Accused: Balance of Advantage In Criminal Procedure*, 69 YALE L.J. 1149 (1960); Comment, *supra* note 46, at 1063.

[67]Warden v. Hayden, 387 U.S. 294 (1967).

[68]*See* Minton v. State, 113 So. 2d 361 (Fla. 1959); State v. Curry, 262 La. 616, 264 So. 2d 583 (1972).

[69]Kastigar v. United States, 406 U.S. 441 (1972). The United States Supreme Court held that full immunity from prosecution for the offense to which the compelled testimony relates is not required before one can be compelled to testify in the face of the fifth amendment privilege against self-incrimination. Immunity from use or derivative use leaves the parties in substantially the same position as if the witness were allowed to claim the privilege.

Mississippi has no formal procedure for granting a witness immunity. *See* McNeal v. Hollowell, 481 F.2d 1145, 1151 (5th Cir. 1973), *cert. denied*, 94 S.Ct. 1476 (1974).

tion, the Supreme Court has ruled that some disclosures by the defendant can be compelled prior to trial,[70] and that he can be tried by a jury of less than twelve[71] and convicted by less than a unanimous vote.[72] Consequently, by raising the issue of "advantage" opponents to discovery hoist themselves by their own petard. If an "advantage" ever existed for the defense, it now has shifted to the state.

In addition to being without foundation, the "advantage" argument seeks to have the state treated as just another litigant, ignoring the special position which it occupies,[73] and losing sight of the true purpose of the criminal prosecution—the ascertainment of the facts.[74]

Without this "advantage" argument, opponents still insist that defense discovery should be denied since there is no reciprocal right for the state (the *quid pro quo* argument). In this posture, however, the argument is a non sequitur. If discovery is necessary or even helpful for adequate preparation by defense counsel, and his adequate preparation is necessary both to satisfy the requirements of the sixth amendment[75] and ensure the effective operation of the adversarial system, then defense discovery offers a benefit to the criminal justice system as well as the defendant. To argue that discovery for the defendant should be denied merely because it benefits the defendant is illogical.

Whether an "advantage" exists for either side may have little relev-

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[70]Williams v. Florida, 399 U.S. 78 (1970).

[71]*Id.*

[72]Johnson v. Louisiana, 406 U.S. 356 (1972).

[73]People v. Williams, 132 Ill. App. 2d 998, 271 N.E.2d 73 (1971) (Stouder, J., concurring). Justice Stouder saw the enigma that while the judicial system recognizes that knowledge and information are prerequisites to an informed rational decision, the defendant in a criminal case is required to determine his course of action based on only minimal information. He then stated:

> At least in the last century no serious student of our system of criminal justice would have suggested that the state and the defendant are equal adversaries. They are equal only in the fictional sense that there are two sides to a criminal case. . . . [W]e still expect the prosecution to act differently than as a mere adversary and we still require the prosecutor to act as the society's agent and not merely as one party in an adversarial system.

271 N.E.2d at 77-78.

[74]

> [T]o deny production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the purpose of a trial which is the ascertainment of truth; that non-disclosure partakes of the nature of a game; and that a state is so solicitous of according a defendant a fair trial that it will not hinder him in the preparation of his defense by depriving him of competent material and relevant evidence.

Cash v. Superior Court, 53 Cal. 2d 72, 75, 346 P.2d 407, 408 (1959); *accord*, People v. Riser, 47 Cal. 2d 566, 586, 305 P.2d 1, 13 (1956).

[75]The constitutional right to counsel is based on the premise that counsel will effectively represent his client. *See* Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968); Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967).

ance to the point for which discovery practices are adopted; *i.e.*, to better achieve the ends of justice through a more complete disclosure of evidence at trial.[76] If this end can be better achieved through full disclosure, disclosure should be enthusiastically endorsed by the courts regardless of how it affects the "balance of advantage."[77]

D. The Work Product Objection

A final objection to criminal discovery has been based upon the fear that defendants will intrude upon the prosecution's "work product." The "work product" doctrine is an outgrowth of civil procedure and was recognized by the Supreme Court in 1947 in *Hickman v. Taylor*[78] as giving a qualified exemption from pretrial discovery to matters which reflect "an attorney's mental impressions, conclusions, opinions or legal theories."[79]

In *Hickman*, the defendant, through his attorney, refused to answer interrogatories concerning interviews which the attorney had conducted with prospective witnesses. From this rather narrow fact situation in which the doctrine had its birth, a broadened scope quickly evolved in the lower federal courts which interpreted and applied it and in the state jurisdictions which adopted it.[80]

All courts agreed that the doctrine only protected materials which were acquired as a result of trial preparation.[81] A major split, however, developed over whether the scope of the rule should be extended beyond the "mental thought processes" of the "attorneys" for the parties to include items which reflected the mental thought processes of others who have assisted in the preparation for litigation.[82] Most courts ulti-

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[76]Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957); Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CAL. L. REV. 56 (1961); *see Discovery in Federal Criminal Cases—A Symposium*, 33 F.R.D. 47, 90 (1964).

[77]Criminal litigation should no longer be considered a sporting event at which the adversaries demonstrate their legal prowess. 6 J. WIGMORE, EVIDENCE § 1845 (3d ed. 1940).

[78]329 U.S. 495 (1947).

[79]*Id.* at 508.

[80]*See Developments in the Law—Discovery*, *supra* note 46; Comment, *The Work Product Doctrine in the State Courts*, 62 MICH. L. REV. 1199 (1964); Note, *"Work Product" In Criminal Discovery*, 1966 WASH. U.L.Q. 321.

[81]Note, *supra* note 80, at 323; *cf. Developments in the Law—Discovery*, *supra* note 46, at 1030.

[82]Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950) (statements obtained from witnesses by someone other than the attorney); *see* Darrigo v. State, 243 So. 2d 171 (Fla. Dist. Ct. App. 1971). Although other courts have disagreed with the holding in *Alltmont* with regard to witnesses' statements, Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968); Brown v. New York, N.H., & H.R.R., 17 F.R.D. 324 (S.D.N.Y. 1955), they agree with the application of the doctrine to things reflecting the mental thought processes of persons other than the attorney who are assisting in the preparation for trial. Virginia Metal Products Corp. v. Hartford Accident & Indem. Co., 10 F.R.D. 374 (S.D.N.Y. 1950).

mately adopted the broader scope.[83] In addition, some courts began to extend the doctrine's protection beyond things which reflected mental thought processes to purely factual matter.[84]

As the scope of the doctrine has varied from one jurisdiction to another, so have its effects on items coming within its protection. Some courts have given an absolute privilege to such items.[85] Others have held that the classification created only a qualified privilege which will be overridden upon a showing by the party seeking disclosure that the facts desired are within the exclusive possession of the adversary and are otherwise nonprivileged and are essential to the preparation of his case.[86]

When this expanded civil doctrine became part of the criminal procedures, it substantially precluded pretrial discovery since everything the state possessed which was relevant to the case was gathered by its agents in preparation for litigation.[87] Consequently, not only were police investigative reports excluded from pretrial discovery;[88] some courts went substantially further and prohibited the discovery of all information gained as the product of a "general investigation of crime."[89] In those jurisdictions where the protection was nearly absolute, the problem of limited defense discovery was particularly acute.[90]

Basically, there are two reasons advanced for the adoption of this doctrine: (1) to limit the opportunity of parties to gain access to information in the adversaries' files without first making an effort on their own to acquire the information desired; *i.e.*, to keep discovery from becoming a substitute for investigation; and (2) to allow the parties, free from the intruding eyes of the adversaries, to act on their own in gather-

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[83]*See* Comment, *supra* note 80, at 1205; Note, *supra* note 80, at 324.

[84]*See, e.g.*, *Ex parte* Ladon, 160 Tex. 7, 325 S.W.2d 121 (1959).

[85]Comment, *supra* note 80, at 1207.

[86]*E.g.*, Stanley Works v. New Britain Redevelopment Agency, 155 Conn. 86, 230 A.2d 9 (1967). This appears to be more in line with the *Hickman* opinion.

[87]State v. Thompson, 50 Del. 456, 134 A.2d 266 (Super. Ct. 1957). *See generally* State *ex rel.* Helm v. Superior Court, 90 Ariz. 133, 367 P.2d 6 (1961); Note, *supra* note 80, at 331.

[88]*See, e.g.*, State *ex rel.* Helm v. Superior Court, 90 Ariz. 133, 367 P.2d 6 (1961).

[89]*See, e.g.*, State v. Thompson, 50 Del. 456, 134 A.2d 266 (Super. Ct. 1957).

[90]The Mississippi Supreme Court has referred to the "work product" doctrine by name in only one civil case, Dent v. Luckett, 242 Miss. 559, 135 So. 2d 840 (1961). In that case the issue was whether photographs which had been taken under the supervision of the defense attorney constituted "work product," as opposed to photographs which he possessed but which were taken by others. The court said that they *may*. The court has never made this doctrine, by name, part of its criminal jurisprudence. In the *Armstrong* opinion, however, the court may have adopted it in substance. While speaking in general terms about the appropriate scope of pretrial defense discovery, the court noted: "This does not mean that a defendant may peruse the private files of a prosecuting attorney or examine his private notes." Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968).

ing facts and developing theories to ensure the most complete exposure of the case at trial thereby resulting in a fairer disposition.[91]

The transfer of the doctrine from civil to criminal procedure overlooked drastic dissimilarities in the two legal systems which make this two-fold rationale inapplicable. Unlike the attorney for the plaintiff in civil actions, the prosecuting attorney's primary concern is not with winning by obtaining convictions but with seeing that justice is achieved.[92] Therefore, the adversarial nature of the proceedings is substantially different. And it is with this recognition that courts are concluding that "disclosure, rather than suppression, of relevant materials ordinarily promotes, rather than impedes the proper administration of criminal justice."[93]

Because of the accusatorial nature of the criminal justice system and the disproportionate power possessed by the state to pursue its charges, the procedures of the system are primarily concerned with aiding the defendant in order to ensure justice and fairness for him. As one court has pointed out, it is axiomatic that "this cannot be achieved if defense counsel is compelled to maneuver in a factual vacuum."[94] And as the presumption of innocence is thought to be essential for ensuring justice and fairness, the same concern would seem to dictate that these "innocent" defendants be presumed to know none of the facts surrounding the charges made against them.

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[91]Hickman v. Taylor, 329 U.S. 495, 508, 510 (1947).

[92]ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1970) states:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103 (1970). *See also* Berger v. United States, 295 U.S. 78, 88 (1935); State v. Zimnaruk, 128 Conn. 124, 20 A.2d 613 (1941); State v. Ferrone, 96 Conn. 160, 168, 113 A. 452, 455 (1921).

[93]Dennis v. United States, 384 U.S. 855, 870 (1966).

[94]Johns v. State, 251 Ind. 172, 240 N.E.2d 60, 64 (1968). Since the defendant is presumed innocent, it would be quite illogical not to assume also that he knows none of the facts surrounding the charges of which he is presumed innocent. *See* Note, *supra* note 80, at 335.

The second reason for the doctrine implicitly assumes that both parties have a relatively equal opportunity to develop their cases for trial. As questionable as this may be in many civil cases, it certainly is not true in criminal litigation. Most criminal defendants are poor[95] and the lawyers who represent them have neither the time nor the resources with which to conduct adequate factual investigation. Even if they did, their investigations often would be to no avail since the lawyers are generally not retained before the evidence has been gathered and witnesses have been interviewed by the police. And as most defense counsel will attest, once a witness has spoken to the police he is most reluctant to talk with either the defendant or his representatives.[96] Therefore, in those jurisdictions in which the scope of the doctrine is broad, and the privileged evidence has nothing to do with the mental thought processes of legal counsel or his assistants, the doctrine gives legal force to what, not inappropriately, could be called a "finders-keepers" rule.

Defense discovery in criminal cases is usually not a profit-making shortcut to defense preparation—often it is the only means by which the counsel can acquire information. But even if used unfairly by defense counsel, denying discovery on that basis serves only to injure the accused.

Certainly those items within the prosecutor's file that have no evidentiary value and reflect only the mental processes of the prosecutor or members of his staff should be excluded from disclosure requirements, not because it will be a shortcut to investigation and will therefore limit the quantity of relevant facts which will be disclosed at trial but because the moving party can show no need for their disclosure.

"Work product" (or any doctrinal exclusions from discovery of a vaguely defined class of items) is undesirable because it is too often unthinkingly applied. When the policy considerations behind it are forgotten, its prophylactic effect is inadvertently and arbitrarily expanded. This should be avoided. A case-by-case evaluation of the needs of each defendant is more appropriate—each request should be evaluated in terms of its reasonableness[97] and the materiality[98] of the items sought to the preparation of a defense.

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[95]See note 65 *supra*.

[96]*See* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

[97]Through the concept of "reasonableness" courts are able to control abusive discovery practices. Discovery which might otherwise be available may be denied: (1) if the request is unnecessarily vague, thereby becoming what some courts have classified as "general exploratory fishing expeditions," Williams v. Wolff, 473 F.2d 1049 (8th Cir. 1973); United States v. Cobb, 271 F. Supp. 159, 161 (S.D.N.Y. 1967); People v. Cohen, 12 Cal. App. 3d 298, 90 Cal. Rptr. 612 (Ct. App. 1970); State v. Bowden, 29 Conn. Super. 86, 272 A.2d 141 (Super. Ct. 1970); Commonwealth v. Preston, 359 Mass. 368, 268 N.E.2d 922 (Mass.

1974); (2) if the defendant has equal access to the items requested, United States v. Smith, 399 F.2d 896, 897 (6th Cir. 1968); United States v. Ball, 49 F.R.D. 153 (E.D. Wis. 1969); State v. Toppi, 275 A.2d 805 (Me. 1971); (3) or if extenuating circumstances make the disclosure unfair, balancing the scope of the state's obligation to search its files or otherwise obtain the items requested with the legitimate needs of the defendant, United States v. Louis Carriau, Inc., 42 F.R.D. 408 (S.D.N.Y. 1967); United States v. Binstock, 37 F.R.D. 13 (S.D.N.Y. 1965) (blanket request which failed to specify the items desired held too broad); State v. Fay, 2 Conn. Cir. 369, 199 A.2d 358 (App. Div. 1963) (motion made just prior to trial held untimely); Ladnier v. State, 273 So.2d 169 (Miss. 1973); People v. Henriquez, 36 A.2d 627, 319 N.Y.S.2d 378 (App. Div. 1971).

Related to the question of "reasonableness" is the problem of whether the duty of the prosecution to disclose should include disclosure of items which are not within its immediate possession and control. The Mississippi Supreme Court has consistently spoken of discovery in terms of tangible items that are within the "possession of the prosecution," Peterson v. State, 242 So. 2d 420, 424 (Miss. 1970); or in the "possession or under the control of the prosecuting attorney," Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968). *See* Mattox v. State, 243 Miss. 402, 137 So. 2d 920, *suggestion of error overruled* 139 So. 2d 653 (1962). The question may be asked: "Should the prosecution be compelled to seek out such items as criminal records of prospective witnesses for use by the defense at trial?"

If the state, through any of its agencies, does not have at least some direct control of the items sought, it would be unreasonable to require it to produce them for inspection. The argument is generally made, however, that despite state control, disclosure should be limited to those items within the actual possession of prosecuting officials, since without such control, compliance is made more difficult, therefore "unreasonable."

The fallacy in this argument lies in the fact that in criminal prosecutions, the *state*, not the prosecutor, is the party plaintiff. The prosecutor is merely legal counsel for the state. To limit disclosure as proposed would be comparable to limiting discovery in civil litigation to those items within the actual possession of the attorney for either party—a result which is totally unheard of. To follow such a practice would allow prosecutors to avoid pretrial disclosure by allowing items to be held by others until trial. *Cf.* United States v. Zammiello, 432 F.2d 72 (9th Cir. 1970). This result might arise solely from the lack of diligence on the part of the prosecution in attempting to acquire the evidence sooner. Consequently, such items as prior criminal records of prospective witnesses, to which the state has exclusive access, would be unavailable. Garcia v. State, 454 S.W.2d 400 (Tex. Crim. App. 1970).

California and Colorado have seen the position of the prosecution for what it is and have obligated it to use due diligence in seeking discoverable items from other governmental agencies. Engstrom v. Superior Court, 20 Cal. App. 3d 240, 97 Cal. Rptr. 484 (Ct. App. 1971); Ortega v. People, 162 Colo. 358, 426 P.2d 180 (1967) (in each of these cases the police department was involved). In United States v. Minor, 14 Crim. L. Reptr. 2059 (D.C. Super. Ct., Sept. 28, 1973), the District of Columbia Superior Court held that the prosecution is required to obtain from the F.B.I. and the Metropolitan Police Department (MPD) impeaching criminal records which are in their hands. The court said that such a record in the hands of the F.B.I. or the MPD "is the functional equivalent of the same record in the prosecutor's file." *Id.* at 2060. A federal district court in Pennsylvania has also recognized this obligation. United States v. Ahmad, 53 F.R.D. 186 (M.D. Pa. 1971). *See also* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 53 (Approved Draft 1970), which recommends the extension of the prosecutor's duty to disclose to all "materials and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or, with reference to the particular case, have reported to his office."

[9]See note 38 *supra*.

E. The Proponents' View: The Necessities Created by Plea Bargaining

A factor which must have a substantial bearing on the extent to which pretrial discovery should be required is the institution of plea bargaining. During most plea negotiations the prosecutor usually makes informal disclosures of some of the evidence which he has against the accused in the hope of inducing him to enter a guilty plea. How much of the state's evidence is disclosed in each case, however, will vary substantially, depending upon the type of case, the prosecutor handling it, the amount of evidence in the possession of the prosecutor at the time of plea negotiations, and the favor in which the defense attorney stands with members of the prosecutorial staff. In so many words, disclosure is wholly arbitrary. Consequently, defense counsel is seldom allowed a complete examination of the prosecution's files, thereby depriving him of the ability to appraise accurately the state's case. Although rendering advice under such circumstances may be technically ethical,[99] and therefore not subject to formal sanction,[100] the factual vacuum in which defense counsel is often left not only diminishes the value of the advice which the circumstances compel that he give, but correspondingly lowers the standard of professionalism for the entire criminal defense bar.

When we allow and even encourage[101] a "bargaining process" to replace the elaborate procedural safeguards we have established to ensure that guilt is fairly determined and punishment fairly administered, we cannot require defense counsel to evaluate the "bargain" without being able to examine closely its whole fabric. As difficult a task as it is to predict trial results with all the facts at one's disposal, the necessity for conjecture as to any of those facts makes wise prediction impossible. What appears from a distance to be worth a high price may upon close inspection be of little value. Consequently, without full disclosure by the state, plea bargain justice may produce dispositions of little more than "bargain basement" quality.

Conclusion

Judge Learned Hand accused our criminal procedure of being

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[99]It should be remembered, however, that the Canons of Professional Ethics are only intended to set the lower limits of professional conduct. See ABA Code of Professional Responsibility, Preamble (1970).

[100]Ethical Consideration EC 7-7 of the ABA Code of Professional Responsibility states that "[a] defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge *appears* to be desirable . . . ." (Emphasis added.) Although the advice required only relates to the appearance of desirability, it would appear as though an investigation as complete as financial resources and other circumstances will permit is required before such advice is given. Disciplinary Rule 6-101(A)(2) directs that "[a] lawyer shall not [h]andle a legal matter without preparation adequate in the circumstances."

[101]Brady v. United States, 397 U.S. 742 (1970).

"haunted" by the "unreal dream" of "the ghost of the innocent man convicted."[102] Certainly with regard to pretrial defense discovery the contrary has always been true. The negative attitude of many courts to pretrial disclosures by the prosecution has reflected an obsession with the guilty man going free.

With the increasing costs of adequate defense preparation and the increasing demands which expanding criminal dockets are making on the practicing bar, liberal pretrial defense discovery is rapidly becoming a necessity. Frequently, pretrial discovery is the only means by which defense counsel can gather sufficient facts to effectively represent his client at trial. But aside from the necessities of trial preparation, the institution of plea bargaining compels us to reexamine our negative attitudes. It is an officially sanctioned short-circuit of constitutional rights which has become the backbone of our criminal justice system and which necessitates the adoption and expansion of procedures such as pretrial discovery to ensure a just operation of the system.

Recent decisions of the Supreme Court have made it clear that the Constitution is not deemed a source for the expansion of defense discovery rights. In *Moore v. Illinois*,[103] it was held that due process of law only requires pretrial prosecutorial disclosure of evidence which is "outcome determinative." Without legislation, therefore, liberalization of pretrial defense discovery rights is dependent upon the discretion of trial judges. But many judges have demonstrated an unwillingness to exercise this discretion in favor of the defense. They continue to limit both its scope and application, advancing those reasons that have traditionally been offered for prohibiting formal discovery altogether. Those reasons, however, can no longer be accepted without question, and substantial doubt has been cast on their validity. The unsubstantiated fears and unfair traditions about the nature of the criminal justice system and the persons upon whom it operates have been exposed. In light of this exposure, courts are coming to the realization that openness in pretrial discovery results in a fairer and more effective administration of criminal justice rather than in the abuses that have been predicted.

"Few issues raise more sharply the basic ideological clash between opposed theories of criminal justice [than does the issue of expanded pretrial defense discovery]. Perhaps this is the reason for the bitterness that has often marked the debate."[104] But through the cloud of rhetoric

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[102]United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). See text accompanying note 64 *supra*.

[103]408 U.S. 786 (1972).

[104]Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279, 282.

which often accompanies such debates, few concrete facts have been offered in support of either position. The merits of the arguments favoring expanded discovery generally appear to be more compelling and should mark the trend in Mississippi as it has for the nation.

ADMINISTRATIVE PRACTICE AND PROCEDURE BEFORE THE MISSISSIPPI BANKING BOARD

Ross L. Franks and Thomas C. Collier, Jr.***

Introduction

This article as originally conceived was to touch only upon the general practice before the Banking Board of the State of Mississippi. It was subsequently expanded to include certain general points of administrative law and other germane topics. The expansion was caused by a seriously felt need to examine the procedural operation of the Banking Board. The article will not cover the areas of general banking operations, banking control, branching, expansion, mergers, or innovative bank organizational techniques, even though these matters all bear upon new bank organization. The article is divided generally into two major divisions. The first will deal with practice before the Banking Board from a practical point of view. The second division will deal with specific procedural questions raised by the statutes of this state dealing with the Banking Board.

I. Practice Before the Banking Board

A. General Considerations

Until recent years, there have been relatively few attempts to organize new banks within this state. Being principally agrarian, the economy of Mississippi subsequent to the depression of 1929 was generally static. In recent years, however, our economy has become more progressive and has spread into the areas of commercial development and industrial manufacturing. This economic growth and diversification has led to a significant increase in the filing of applications for new banks, especially during the last 5 years.[1] This activity before the Banking Board has led to more active litigation in this field. For this reason, it is hoped that this article will be beneficial to the members of the Bar who are called upon to appear before the Banking Board. It is also felt that it may prove to be of some assistance to the Board and to the

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[1]Information furnished by the office of the Comptroller of the Mississippi Department of Banking Supervision and attached to Article as Addendum A.

judiciary of the state as they are called upon by applicants and opponents to reexamine the procedural aspects involved in seeking a new bank charter.

B. Preliminaries to Filing

At the outset it is urged that any interested party carefully read Title 81, Chapters 1, 3, 5, 7, and 9 of the Mississippi Code Annotated of 1972. The Board is a creature of statute.[2] Banks originally were created by legislative enactment until the legislature saw fit to delegate this function to the State Banking Board.[3] The grant of authority to the Board is contained in only one section of our Code.[4] It is noted, however, that many other procedural questions are determined by some of the general banking statutes. A thorough understanding of all the banking statutes is imperative.

The Board has been held to be an administrative agency and not an inferior tribunal.[5] Its primary function is to pass upon applications for the chartering of new state banks.[6] The State Comptroller is one of five voting members.[7] He is in the peculiar position, however, of being not only a voting member but also an investigating and recommending officer. The special nature of the Comptroller's responsibilities, along with areas of possible conflicts regarding the other board members, will be discussed and dealt with in the second section of this article. The Comptroller is given general authority over the Department of Bank Supervision.[8] It is recommended that there be an in-depth discussion with the Comptroller prior to filing for a bank charter; this discussion is well worth the time spent.[9] The Comptroller has statutory authority[10] to keep all furnished information and documents undisclosed until the public hearing, although there is some question whether this authority extends to the application for a new bank. The matter has not yet been presented to a court. The recommended practice is to furnish, upon request by opposing counsel, copies of any documents filed.

A request to the Comptroller by a proponent of the bank can pro-

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[2]MISS. CODE ANN. § 81-3-13 (1972).

[3]Britton & Koontz First Nat'l Bank v. Biglane, 285 So. 2d 181 (Miss. 1973).

[4]MISS. CODE ANN. § 81-3-13 (1972).

[5]Planters Bank v. Garrott, 239 Miss. 248, 122 So. 2d 256, *suggestion of error overruled*, 133 So. 2d 240 (1960).

[6]Britton & Koontz First Nat'l Bank v. Biglane, 285 So. 2d 181 (Miss. 1973).

[7]MISS. CODE ANN. § 81-3-13 (1972).

[8]*Id.* § 81-1-1.

[9]It is also wise to keep the representatives of the Federal Deposit Insurance Corporation advised on all plans and actions. This holds true whether one is representing the proponents or the opponents of the bank.

[10]MISS. CODE ANN. § 81-1-31 (1972).

duce forms for the articles of incorporation, as well as examples of petitions or applications. Several different examples should be reviewed in light of the relevant statutes. In preparing for filing, particular attention should be given to the statutory provisions relating to the name of the proposed bank,[11] the number of organizers, and their moral and business reputation and character.[12] When preparing the articles of incorporation, there should be strict compliance with each specified item.[13] In recent hearings before the Board,[14] issue was taken regarding compliance with these provisions. All of these cases were appealed, and hopefully the Mississippi Supreme Court will be afforded an opportunity to rule upon the required degree of compliance with the statutory provisions.

One of the most important items in the articles is the representation of the total amount of the proposed bank's capital and the par value and selling price of the stock. The number of shares, par value, and selling price are also quite important to future operatons of the bank, both from tax and marketing aspects. One would not be ill-advised to obtain advice from both an economist and a banker as to the optimum amount of initial capital. The statutory minimum capital is based upon the size of the city in which the bank is to be located.[15] The provisions are generally regarded as being outdated, however, and serious consideration must be given to the actual capital needed, as well as to the capital requirements of the FDIC. Based upon experience, it is submitted that approximately ten times the state requirement is necessary to meet FDIC requirements, though a more accurate estimate may be made based upon advance discussions with the FDIC. No commitment will be made prior to filing.

At the present time, all banks in Mississippi are insured by the FDIC, and it is anticipated that this will continue. In every other state,

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[11] *Id.* §§ 81-3-1, -3.

[12] *Id.* § 81-3-5.

[13] *Id.* § 81-3-7.

[14] *In re* Charter of Baldwyn State Bank, No. 10,467 (Prentiss County, Miss. Ch., Apr. 26, 1974); Hancock Bank v. Banking Bd., No. 64,146 (1st Dist. Harrison County, Miss. Ch., filed Oct. 29, 1973); Merchant's Bank v. Banking Bd., No. 64,147 (1st Dist. Harrison County, Miss. Ch., filed Oct. 29, 1973); Gulf Nat'l Bank v. Banking Bd., No. 64,135 (1st Dist. Harrison County, Miss. Ch., filed Oct. 26, 1973) (the latter three were consolidated on appeal from the opinion of the Banking Board granting approval for the chartering of the proposed First State Bank and Trust Co. in Gulfport, Mississippi). In the *Baldwyn State Bank* case the Chancellor affirmed the general nature of the Comptroller's findings and additionally ruled that the sufficiency of the articles of incorporation was to be determined by a test of substantial compliance with the statutory requirements. The Chancellor relied heavily on Britton & Koontz First Nat'l Bank v. Biglane, 285 So. 2d 181 (Miss. 1973). Further appeal has not been taken.

[15] MISS. CODE ANN. § 81-3-11 (1972).

the FDIC application is filed at approximately the same time as the application with the state regulatory board. In Mississippi, by custom, the filing of the FDIC Application does not take place until after the granting of the charter or articles of incorporation. Much confusion could be avoided by simultaneous filings, although there could be some drawbacks, such as the requirement of furnishing the name of the proposed president with a full subscription list of ultimate stockholders.

The requirement for the stockholder list[16] is usually met simply by having the incorporators initially subscribe to all of the proposed stock. The stock, of course, will be divided differently after the charter is granted. This arrangement is normally arrived at by a written agreement between the incorporators.

A copy of the proposed articles must be filed with the petition or application.[17] Usually, at the same time, the articles of incorporation are executed in triplicate[18] and lodged with the Comptroller for filing, although such filing is not automatic and must be authorized. The filing fee is paid when the articles are actually filed.[19]

By a letter to attorneys practicing before the Board, dated October 1, 1973, the Secretary of the Board requested that there should thereafter be filed: three copies of the application or petition, each with original signatures; four copies of the articles of incorporation, each with original signatures; and at least 12 copies of each exhibit to be introduced. This has been of great assistance to the Board but, as hereinafter mentioned, was not done in a proper exercise of the Board's rulemaking authority. The petition of application to the Comptroller and Banking Board must be sworn to by one of the incorporators.[20] The filing is usually accomplished by personally delivering the documents to the Comptroller. They may, however, be mailed in.

The statute[21] sets forth the procedure for the Board to follow upon filing. It is incumbent upon the Comptroller to determine initially that all legal requirements of the proposed articles have been met. He shall then make an investigation into the statutorily specified items.[22] It is customary for this investigation to be delegated to one examiner used primarily for this purpose. Upon the completion of this investigation, the Comptroller must reduce his findings to writing and draw up his recommendations. The Comptroller shall then call a meeting of the Board to consider his findings and recommendatons, giving at least 10

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[16] *Id.* § 81-3-7(e).
[17] *Id.* § 81-3-13.
[18] *Id.* § 81-3-7.
[19] *Id.*
[20] *Id.* § 81-3-13.
[21] *Id.*
[22] *Id.*

days' notice to all parties.[23] It is also customary for him to give notice to all interested parties in the vicinity where the proposed bank is to be located and to run notices in all local papers.

An interesting technique, sometimes used in advance of filing, should be considered. Historically, the office of the Comptroller has accepted for filing "Letters of Intent." The purpose of this procedure is to give the application a status as "pending" before the Board or Comptroller. These letters have generally been accepted so long as written in good faith as part of an ongoing process leading to filing within a reasonable time. This step should be considered as soon as any action is taken seeking a new Bank Charter, because our statute provides that no action can be taken on a new application, branch, or removal, as long as another application is pending before the Comptroller, Board, or Court.[24] In some instances, on learning of a proposed new bank, the quick filing by an opponent has preempted the docket and occasioned unreasonable delay in hearing the originally intended application. It has also been felt that the same procedure has been used not only to prevent incorporation, but also branching or merging. The use of the statute as a defensive tool is not condoned, but it is available to one who chooses to use it. The filing of the "Letter of Intent" would fix the docket priorities so that a subsequent defensive filing would not delay the hearing. This provision apparently applies also to national banks. In a recent federal case,[25] the Banking Board was enjoined from proceeding with a hearing because a national bank had first applied for permission to move its home office to the same town. This decision extended the statute's application, not only to formation of national banks, but also to removal applications. It is quite possible that the statute will also be extended to cover proposed mergers and branching applications. Additionally, the Comptroller of Currency recently refused to continue a hearing for removal and branching while a previously filed application for a new state bank was pending before the Banking Board.[26] This matter is, however, on appeal to the Federal District Court for the Northern District of Mississippi.

C. Subpoenas

In advance of the hearing, one must give consideration to any necessary subpoenas. The Board has subpoena powers,[27] and all needed sub-

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[23]*Id.*

[24]*Id.*

[25]First Nat'l Bank v. Smith, Civ. No. EC-7063-S (N.D. Miss., Nov. 1, 1972).

[26]First Nat'l Bank of Southaven, heard before the Regional Administrator in Memphis, Tennessee, November 23, 1973.

[27]Miss. Code Ann. § 81-1-27 (1972).

poenas should be issued prior to the hearing. When dealing with a local or cooperative witness, the subpoena may be issued on the day of the hearing. The statute provides that the Board has the power to compel the attendance of witnesses the same as the Comptroller.[28] No mention is made, however, that the Board has authority to compel the production of documents. Several times the Board has refused to issue subpoenas duces tecum, but only because of the particular document sought.[29] A lack of authority has never been the basis for the denial of such a motion. It could be argued that by reading the statute granting subpoena authority[30] into this statute, such authority could be found. Yet this is not a clear answer, for it appears that the Comptroller can only issue simple subpoenas and must resort to the process of the chancery court to compel testimony or require production of records. Since this point has not been raised before the court, it is still subject to the practitioner's interpretation.

There is also a question whether the Comptroller can issue subpoenas for the hearing before the Board, especially since an application for a new bank is properly before the Board and not the Comptroller. If he cannot, then one would have to wait for the Board to convene before requesting the issuance of subpoenas; undue delay would frequently result. It is obvious that the Board could delegate this responsibility to the Comptroller if it desired. This entire procedural issue could be laid to rest through sound exercise by the Board of its rulemaking authority. At present it would appear best to request the Comptroller to issue subpoenas prior to the hearing, and then if the witnesses do not appear, request the Board to also issue them when it convenes.

D. Determining and Proving a "Public Necessity"

In preparing for the hearing, both the proponents and opponents must build their case and marshal their proof to touch upon the question of "public necessity."[31] A practitioner before the Board should come to grips with a workable definition of this nebulous term, although there does not appear to be a firm, acceptable definition. In *Planters Bank v. Garrott*,[32] Mississippi's Supreme Court first addressed this problem. It cited, with approval, a Michigan decision defining "necessity" as "a substantial or obvious need justifying the chartering of a new bank in

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[28]*Id.* § 81-3-13.

[29]Hancock Bank v. Banking Bd., No. 64,146 (1st Dist. Harrison County, Miss. Ch., filed Oct. 29, 1973). See note 14 *supra*.

[30]MISS. CODE ANN. § 81-1-27 (1972).

[31]*Id.* § 81-3-13.

[32]239 Miss. 248, 122 So. 2d 256, *suggestion of error overruled*, 239 Miss. 248, 133 So. 2d 240 (1960).

view of the disclosed relevant circumstances."[33] The Mississippi court went on to say that mere convenience is not sufficient to satisfy the requisite of "necessity." It is recognized, however, that the element of convenience is to be taken into consideration when supplemented by the proof of facts and circumstances which are persuasive of "necessity." It is easily seen that this definition and approach leaves the matter, like beauty, to rest in the eye of the beholder. In *Garrott*, the court found that the Board's finding of "public necessity" was supported by substantial evidence which included: the geographical area of the county and the population; the total assessed valuation of taxable property; the number of unit banks presently serving the county; the major highways and railways serving the county; the basis of the economy; the number and type of commercial enterprises within the county; the method of capitalizing the new proposed institution; and the moral and business character of the incorporators.[34] The court also appeared to pay particular attention to opinions and testimony relating to bringing new deposits into the county. In *First National Bank v. Martin*,[35] the court again discussed necessity. Here the evidentiary items covered were delineated substantially along the lines previously mentioned. In denying the application, the court stressed the fact that in the particular circumstances under consideration there would be no "new money" brought in from outside sources and that all funds derived by the proposed new bank would come from presently existing facilities. It is clearly stated in this case that probability of success of a proposed bank does not demand a finding of "public necessity."[36] Another relevant statement frequently made is that the statute requiring public necessity

> was enacted in the exercise of the police power of the state in the interest of the public, and as an aid to insure safe banking. Its purpose is not to deter competition or foster monopoly, but to guard the public and private interests against imprudent banking.[37]

It is essential for an attorney practicing before the Board to develop an understanding of the basic concept of "public necessity." He must be able to relate this to both his expert and lay witnesses. Possibly the best discussion of this concept is found in the opinion by Chancellor Anderson in *Bank of Bruce v. Crocker*.[38] The opinion discusses various relevant points which afford a valuable insight into the development of

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[33]Moran v. State Banking Comm'r, 322 Mich. 230, 33 N.W.2d 772, 778 (1948).
[34]239 Miss. at 260-62, 122 So. 2d at 259.
[35]238 So. 2d 856 (Miss. 1970).
[36]*Id.* at 860.
[37]Planters Bank v. Garrott, 239 Miss. 248, 280, 122 So. 2d 256, 269 (1960).
[38]No. 7809 (Calhoun County, Miss. Ch., June 13, 1968).

the requirement of "necessity." In the opinion, the various economic indicators and economic factors of the Calhoun County area are dealt with at length. The per capita deposits and per capita income are discussed, along with the loan base. The opinion evaluates the status of the existing banking facilities and stresses the total income of the county, along with the character of the proposed incorporators. The total loans made in the county were found to be abnormally low compared to the number of banks in the county, and the deposited funds within the county were not being used to promote economic growth there. The opinion indicates that a common sense approach to determine whether a necessity exists is favored.

> It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. . . . This word then, like others, is used in various senses, and in its construction, the subject, the content, and the intention of the person using them are all to be taken into view.[39]

A considerable amount of confusion could be eliminated if the Board, under its rulemaking authority, would choose to address the question of what constitutes a "public necessity."

The scope of review of an appeal from the Banking Board is limited.[40] The Board has been reversed only once,[41] and then only because it had clearly exceeded its statutory authority. The customarily accepted manner of proof now utilized in a charter hearing consists of institutional witnesses (*i.e.*, the proposed incorporators or officers of the opposing bank), professional economists, and lay witnesses from within the community. The proponents usually include a Certified Public Accountant to testify about a prepared 3-year pro forma statement of the proposed institution.

The great upsurge in bank hearings has brought the economist into his own glory. In addition to professional recognition, the economist has also received quite an increase in financial reward. His time is expensive, but valuable. The prevailing fee charged by several have equalled and in some instances eclipsed those of the attorneys. Since the charges of attorneys are fairly well set,[42] it appears that in the near

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[39]*Id.* at 34, *quoting* McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 414-15 (1819).

[40]Planters Bank v. Garrott, 239 Miss. 248, 122 So. 2d 256 (1960).

[41]Oliphant v. Carthage Bank, 224 Miss. 386, 80 So. 2d 63 (1955) (granting of new bank charter on conditional order that existing bank sell 49 percent of its outstanding stock to new bank held improper).

[42]It has been determined by the FDIC that reasonable charges for attorneys representing proposed new banks shall be $5,000 for handling the hearing and acquiring FDIC insurance. Letter from Roy Jackson, Regional Director-FDIC to Ross Franks, June 11, 1974, on file with Mr. Franks. There have been efforts on the part of some attorneys to avoid this by having the proposed bank pay that amount and other individuals pay sums in excess of this. This sum generally is fair and reasonable and under such circumstances where additional work is required, an additional sum will be allowed upon a proper showing of sufficient time and effort spent.

[13]A sample copy of an Agenda is attached as Addendum B.

future some adjustment of the fees of the economist may be needed.

Since the popularity of any economic approach appears to be cyclical, a careful determination of the economist and his approach is necessary. The method or approach used by any particular economist is readily ascertainable from previous reports and studies. Generally, once an economist utilizes one approach, he will not change it to accomodate different circumstances. To the attorney for the opposition, this affords an opportunity of preparing in advance for any economist. To the attorney representing the proposed bank, it affords a way to match a specific method or economic concept to the particular circumstances of the case. It is very important, however, to allow the economist to maintain his independence. This will be tested at the hearing.

The earlier work is begun with an economist, the easier the job will be. The best approach is first to employ an economist to conduct an independent feasibility study for the benefit of your proposed incorporators. This will give the incorporators a good business basis for their decision and also afford the economist an opportunity to determine whether or not he can professionally maintain the position you desire. Since the nature of the hearing rests to a great extent upon economics, it is very important for the practitioner to develop a working knowledge of the mechanics and philosophies of both banking and economics. At all times it must be remembered that the economists are professionals and must be handled as expert witnesses. Since the testimony of any particular economist is determined to a large extent by the economic theory he embraces relating to banking, the attorney should request from him at least two other reports which he has prepared. On reviewing these reports, the attorney can work with the economist in making necessary adjustments, both in the report and in his testimony.

E. The Hearing

The hearing before the Board, if protested, is of an adversary nature. The rules of evidence are greatly relaxed, however, and the hearing is conducted informally. If the matter is not protested, the hearing is highly informal and moves rapidly.

As the hearing begins, an agenda is distributed. This agenda is a one-page list of the order of procedure before the Board.[43] There is at-

tached to the agenda a photostatic copy of all the pertinent banking laws. The agenda format, which rarely changes, appears to be an attempt by the Board to exercise its rulemaking authority.

The Board elects its own chairman who presides over the hearings. There is usually in attendance a representative of the attorney general's office assigned to the Board, and a court reporter.[44] The chairman convenes the meeting, and the application to be heard is called. A copy of the agenda, the notices of the meeting, and the application and articles are then filed. All parties are requested to identify themselves, their clients, and their positions. Preliminary motions are then heard. If there should be a continuance, it will be to a day certain, at which time the hearing will commence where it terminated. If the hearing continues, all witnesses are sworn in by the Comptroller who has the authority to administer the oath.[45] There is no statutory provision requiring sworn testimony, but this is always done at the request of the Board.

At this point the Comptroller introduces and furnishes all parties a copy of his findings and recommendations. In earlier cases, he submitted these items at the end of all proof, but before the Board retired to reach a decision. This was done in reliance upon *Planters Bank v. Garrott*.[46] In *Britton & Koontz First National Bank v. Biglane*,[47] however, the court held that a copy of this report should be filed and furnished to all interested parties at the outset of the hearing. The court pointed to the parties' need to rebut the Comptroller's report as a justification for the procedural change. (Since the findings and recommendations are written and are also hearsay, it is difficult to imagine how they can be rebutted without actual examination of the Comptroller or his assistant. The Board, however, has consistently refused to allow calling the Comptroller or his examiners as witnesses.)

In two recent cases[48] which predate *Britton & Koontz*, the Board was enjoined from proceeding with the hearings until the Board had made available to all parties the Comptroller's findings and recommendations for at least 10 days. This creates the possibility that someone may again try to acquire these items in advance of the hearing. With regard to the specificity of the Comptroller's findings,[49] two interesting cases are now pending on appeal to their respective chancery courts. In

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[44]MISS. CODE ANN. §§ 81-1-29, -3-13 (1972).

[45]*Id.* § 81-1-27.

[46]239 Miss. 248, 122 So. 2d 256 (1960).

[47]285 So. 2d 181 (Miss. 1973).

[48]Hancock Bank v. Banking Bd., No. 89,643 (1st Dist. Hinds County, Miss. Ch., Aug. 17, 1973); First Nat'l Bank v. Means, No. 90,032 (1st Dist. Hinds County, Miss. Ch., Aug. 17, 1973).

[49]*See* MISS. CODE ANN. § 81-3-13 (1972).

Hancock Bank v. Banking Board,[50] the question is raised as to whether the findings of the Comptroller must be specific and definite. *For Charter of Baldwyn State Bank*,[51] the question is raised as to the necessity for findings to be made for each of the specified items in the statute. The decision in these two cases may clarify this matter for the practitioner. The Mississippi Supreme Court at last has the opportunity to define the scope of the Comptroller's findings as required by statute.

The Board, on request of the chairman, will allow either side or any interested party to make an opening statement. Then the proof is made, similar to a trial. The proponents open and must meet their burden of proof.[52] All witnesses are subject to cross-examination. After the proponents rest, the opponents in like manner present their proof. The proponents may then rebut. It is then usually asked if anyone in attendance has any comments he wishes to make upon the subject matter under hearing. The Board is then polled by the chairman to see if each member feels he has sufficient evidence and information upon which to base a decision. If the vote is in the affirmative, the Board hears closing arguments and retires to executive session to consider the evidence presented. Usually the matter is decided at that time, and the Board returns and announces its decision. Occasionally, in an unusual situation, the Board will take the matter under advisement. If the Board, on being polled, feels that it does not have sufficient information, it will request the desired information and recess to a day certain.[53]

Customarily the written opinion and decision will be prepared during the next few days. It will be presented to and signed by each member, and then incorporated in the minutes of the Board.

There are varying views as to the proper presentation of the case. It should be recognized that in all likelihood the economist will be by far the most lengthy witness. Most attorneys allow their economist too much latitude. A written report will be filed along with testimony and many times attorneys allow him to read it verbatim. Since the economist's report is filed for consideration by the Board, the best procedure is for his testimony to be succinct, addressing only the main points. Whether he testifies first or last is a matter of personal discretion. Occasionally rebuttal witnesses are effectively used.

F. Appeals

As noted in the statute, any aggrieved party can appeal.[54] The ap-

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[50]No. 89,643 (1st Dist. Hinds County, Miss. Ch., Aug. 17, 1973).

[51]No. 10,467 (Prentiss County, Miss. Ch., Apr. 26, 1974).

[52]Britton & Koontz First Nat'l Bank v. Biglane, 285 So. 2d 181 (Miss. 1973).

[53]Miss. Code Ann. § 81-3-13 (1972).

[54]*Id.*

peal from the Banking Board is to the chancery court of the county where the proposed bank is to be located. The appeal is perfected by filing a bond in the amount of $250 with the clerk of the chancery court of that county. The bond will be approved by the clerk. It is also noted that the bond will be payable to the state.[55] It is obvious, therefore, that this is not a supersedeas bond. There have been several efforts made by an opponent to appeal with supersedeas from an order granting bank charter. None of these, however, have been successful.[56] This has allowed several banks to actually open for business while the appeal is pending. On approval of the bond, the clerk notifies the Comptroller of the appeal. It is then the Comptroller's duty to transmit to the clerk the originals and one certified copy each of the application and proposed charter of incorporation, his findings and recommendation, and the opinion and decision of the Banking Board. He will also forward a copy of the transcript of the pleadings and testimony, both oral and documentary, which the clerk shall docket.[57] It is important to keep in mind the statutory requirements regarding giving notice to the court reporter, which also apply to appeals from the Banking Board.[58] The individual therefore must give notice of his intent to appeal and designate those portions of the record desired within 10 days from the giving of the opinion and decision by the Board.[59] If this is not done it would appear that on proper motion the appeal would be without benefit of a transcript. After the clerk of the chancery court has the matter docketed, it shall be the duty of the chancellor to hear the cause speedily; anyone then aggrieved can appeal to the supreme court.[60]

In an appeal to the chancery court there is also submitted a writ of error. In preparing this writ and determining the major areas of emphasis for appeal, one should keep in mind the court's scope of review. Generally, the opinion of the Banking Board will be sustained as long as there is substantial evidence to support it and it is not arbitrary or capricious.[61] It is obvious, therefore, that any hope of reversal must be on substantial questions which have previously been raised before the Board and are in turn raised before the chancery court. The court has held that the Board will be allowed latitude in exercising both its own

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[55]*Id.*

[56]This question came before the Mississippi Supreme Court in First Nat'l Bank v. Martin, 238 So. 2d 856 (Miss. 1970), and though not in the report of the case, may be found in the file. This was also presented to the court in Citizens Bank v. Poole, No. 13,980 (Marion County, Miss. Ch., Dec. 30, 1970), *supersedeas denied*, No. 46,444 (Miss. Sup. Ct., Mar. 12, 1971).

[57]MISS. CODE ANN. § 81-3-13 (1972).

[58]*Id.*

[59]*Id.* § 9-13-33.

[60]*Id.* § 81-3-13.

[61]Planters Bank v. Garrott, 239 Miss. 248, 122 So. 2d 256 (1960).

judgment and its peculiar expertise.[62] It has additionally been held that no question of improper notice can be raised unless it has first been raised before the Board and objected to.[63] This gives rise to the possibility that no procedural error, which could have been raised before the Board but was not, can subsequently be used on appeal. It has additionally been held that no appellant can assign as error or complain of errors for which he himself is responsible or which he invited, induced, or participated in.[64] The "erroneous exclusion of evidence" will not be grounds for reversal unless the record shows that "it is prejudicial to substantial rights of the appellant."[65] The Board will not be reversed for technical errors; there must be a clear showing that the error complained of is "substantially prejudicial" to the complaining party and the public.[66] The court has also quoted, with approval, rules which hold that there can be no reversal for "misdirection, . . . improper admission, or exclusion of evidence, or . . . error as to . . . pleading or procedure unless it . . . appear[s] . . . from the *whole* record . . . that [the result thereof was] a miscarriage of justice."[67]

In light of the above, it is readily ascertainable why so many appeals have been unsuccessful. It is frequently found, however, that the possible success is not the sole determining factor in deciding whether to perfect an appeal. In a great many instances, the parties involved want the delay or time lag occasioned by an appeal and are willing to pay for it. As set forth above, some individuals will be able to open a bank immediately upon receiving the charter, even with an appeal pending. Usually, however, an appeal will forestall the opening of a bank, and those opposing it will have an additional year or so to prepare for the new competitive force.

II. Procedural Recommendations

> 'The inexorable safeguard which the due process clause assures in the exercise of a judicial or quasi-judicial power is that the trier of facts shall be an impartial tribunal legally constituted to determine the right involved, that no finding shall be made except upon due notice and opportunity to be heard, that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there shall be opportunity for a court to

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[62]First Nat'l Bank v. Martin, 238 So. 2d 856 (Miss. 1970).
[63]Hernando Bank v. Davidson, 250 Miss. 23, 164 So. 2d 403 (1964).
[64]Planters Bank v. Garrott, 239 Miss. 248, 122 So. 2d 256 (1960).
[65]*Id.*
[66]Hernando Bank v. Davidson, 250 Miss. 23, 33, 164 So. 2d 403, 406 (1964).
[67]*Id.* at 34, 162 So. 2d at 406-07 (emphasis added).

determine whether the applicable rules of law and procedure were observed.'[68]

The procedures one encounters when practicing before the state Banking Board occasionally fall short of ensuring the "inexorable safeguards" which *Love v. State Board of Veterinary Examiners* so firmly established as the minimum protections the due process clause commands administrative agencies to provide. The successful functioning of the Board must be attributed to one of the system's greatest assets, the integrity and dedication of its members. The friendly nature and efficient manner of the staff contribute greatly to the effective operation of the entire administrative agency. This fact notwithstanding, however, the result of the administrative procedures of banking agencies in general "has been a degree of unchecked and unstructured discretionary power that is far greater than it should be. . . . The banking agencies can and should make procedural changes that will increase both efficiency and fairness."[69] The purpose of the following discussion is to recommend procedural changes which will further these two goals of administrative law: efficiency and fairness.

A. The Comptroller's Combination of Functions

Once an application seeking "a certificate of authority to incorporate" has been filed, the essence of the administrative responsibility of the Banking Board is twofold: (1) to provide an on the record hearing for all parties, and (2) to decide whether a "public necessity" exists based upon (a) the recommendations of the Comptroller and (b) the evidence presented by the parties.[70] The Comptroller is not only charged with sitting as a member of this decision-making body, he is also required to conduct an *ex parte*[71] investigation into 17 specific factual areas and then to recommend to the Board his conclusions regarding the ultimate factual issue—the existence of a "public necessity."[72] The conflict is obvious; the combination of functions lodged in the office of the Comptroller operates to deny all parties their constitutional right to due

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[68]Love v. Mississippi State Bd. of Veterinary Exam., 230 Miss. 222, 230, 92 So. 2d 463, 467 (1956), *quoting* 42 AM. JUR. *Public Administrative Law* § 116, at 451 (1942).

[69]Davis, *Administrative Procedure in the Regulation of Banking*, 31 LAW & CONTEMP. PROB. 713 (1966).

[70]MISS. CODE ANN. § 81-3-12(1) (1972).

[71]The term "*ex parte*" in the field of administrative law, has gained a definition broader than its normal use. As used here, the term connotes an investigation (1) conducted by someone not a party to the conflict, (2) conducted without the normal procedural safeguards inherent in a judicial investigation, and (3) whose subject matter, even though it forms the basis for the Comptroller's recommendation, is held secret from the parties.

[72]MISS. CODE ANN. § 81-3-13(1) (1972).

process inherent within the statutorily given right to a hearing before this agency.

The fact that the statute contemplates this combination is no answer. Once it is established that the parties are entitled to an adjudicatory hearing, they are thereby entitled to a fair and impartial hearing regardless of the statutory scheme.[73] The pertinent statutory requirements are that the Comptroller "give notice" extending an "invitation to be heard" to "prospective incorporators" and to "any and all other interested persons."[74] The very language of this statute confers upon all interested parties the right to a hearing.[75] That hearing should be adjudicatory because the determination of a contested licensing case involves "adjudicative" facts,[76] and the statute states that the hearing should be considered a "judicial" proceeding.[77] Recognizing this, the Board has, with the implicit approval of the court, historically provided an adjudicatory hearing for the parties.[78] Since there exists this right to an adjudicatory hearing, there exists *ipso facto* a right to a fair and impartial hearing.[79] It is this right which the Comptroller unintentionally violates each time he participates in the final resolution of a case which he has investigated and statutorily prejudged.

Professor Kenneth Culp Davis claims that: "The case law, both federal and state, generally rejects the idea that the combination with judging of prosecuting or investigating functions is a denial of due process . . . ."[80] In deference to Professor Davis, this statement was made in 1958. It is now apparent that it is no longer accurate: (1) the case which provided the foundation for Professor Davis's perception is now infirm authority; (2) many cases now hold that the combination of an

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[73]*See, e.g.*, Love v. Mississippi State Bd. of Veterinary Exam., 230 Miss. 222, 92 So. 2d 463 (1956).

[74]MISS. CODE ANN. § 81-3-13(1) (1972).

[75]*See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.01 (3d ed. 1972).

[76]2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.09 (1958). Examples of adjudicative facts involved in a controversy before the Banking Board would include: the condition of existing banks, the effect a new bank will have on existing banks, whether a new bank will be able to operate profitably, and the moral character of the proposed incorporators. *See* MISS. CODE ANN. § 81-3-13(1) (1972).

[77]*See* MISS. CODE ANN. § 81-3-13(2) (1972).

[78]*See* Britton & Koontz First Nat'l Bank v. Biglane, 285 So. 2d 181 (Miss. 1973); First Nat'l Bank v. Martin, 238 So. 2d 856 (Miss. 1970); Hernando Bank v. Davidson, 250 Miss. 23, 164 So. 2d 403 (1964); Planters Bank v. Garrott, 239 Miss. 248, 122 So. 2d 256 (1960); Oliphant v. Carthage, 224 Miss. 386, 80 So. 2d 63 (1955).

[79]"The word *hearing* in a statute shows a manifest purpose to afford due process of law." Smith v. Skagit County, 75 Wash. 2d 715, 453 P.2d 832, 847 (1969); *see* Love v. Mississippi State Bd. of Veterinary Exam., 230 Miss. 222, 92 So. 2d 463 (1956); 1 F. COOPER, STATE ADMINISTRATIVE LAW ch. V (1965); K. DAVIS, *supra* note 75, at §§ 7.03 - .04. *Compare id. with id.* § 7.05.

[80]2 K. DAVIS, *supra* note 76, § 13.02, at 175.

inconsistent function with judging is per se grounds for disqualification; (3) the vast majority of the remaining courts consider such a combination suspect and, therefore, strictly review any claims of either prejudgment or judgment based upon *ex parte* information; (4) only a distinct minority of courts still cling to Professor Davis's view.

Professor Davis's thesis relies most heavily upon the grandfather of the combination cases, *Marcello v. Bonds*.[81] The case succinctly holds that the combination of prosecutory and adjudicatory functions does not violate due process. Yet *Marcello* is a feeble and impotent precedent. It has not been overruled, but its strict approach has been abandoned by the courts. The *Marcello* holding was a victim of the preceeding and surrounding circumstances. The case involved the deportation of a suspected communist alien during the height of McCarthyism. Five years earlier, the Supreme Court had broadly interpreted the Administrative Procedure Act[82] to bring such hearings under its separation of functions provisions.[83] Congress swiftly countered and specifically excepted these hearings from the protections of the Act.[84] The Court was faced with the virtual congressional overruling of its previous decision; it acquiesced, and held that due process does not require the separation of functions.

The progeny of *Marcello* are equally specious. Few cases have used its rationale.[85] Most federal cases which tend to support *Marcello* actually either hold that the alleged combination was not proven[86] or that the agency function was legislative, as opposed to adjudicative.[87] Federal combination cases which even discuss due process are rare. Most of these cases are settled statutorily,[88] thus insulating the early due

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[81]349 U.S. 302 (1955).

[82]5 U.S.C. § 554(d) (1967).

[83]Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[84]Supplemental Appropriations Act, ch. 1052, 64 Stat. 1044, 1048 (1950).

[85]*E.g.*, Belizaro v. Zimmerman, 200 F.2d 282 (3d Cir. 1952); Brinkley v. Hassig, 83 F.2d 351 (10th Cir. 1936) (relying heavily on necessity).

[86]The courts have failed to find either a combination of functions problem or prejudgment where an individual has heard the same case on successive occasions. NLRB v. Donnely Garment Co., 330 U.S. 219 (1947); MacKay v. McAlexander, 268 F.2d 35 (9th Cir. 1959); *see* Pangburn v. CAB, 311 F.2d 249 (1st Cir. 1962) (the court similarly treated two separate cases before the same body which involved the same ultimate factual determination).

[87]American Tel. & Tel. Co. v. FCC, 449 F.2d 439 (2d Cir. 1971); Wilson & Co. v. United States, 335 F.2d 788 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965).

[88]*See, e.g.*, Twigger v. Schultz, 484 F.2d 856 (3d Cir. 1973), where the court relied on 5 U.S.C. § 554(d) (1967), which states that an employee cannot advise or participate in an agency decision in which he performed an investigative or prosecuting function.

> The interesting observation to be made concerning this sort of commingling of "prosecution" and "judging" powers in a single pair of hands is that in a literal sense it practically never exists in the Federal administrative machine.

W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 20 (1972).

process decisions from incisive testing.

State courts, in the past, were more willing to follow *Marcello*'s lead. A few of those decisions expressly allowed a combination of functions.[89] Other state courts, although reaching the same decision, did not necessarily follow the *Marcello* reasoning. Instead, some independent variable contributed to each decision.[90] It appears, therefore, that the state courts were also skeptical of *Marcello*'s holding.

The most telling criticism of both *Marcello* and Davis's statement is to be found in *Gibson v. Berryhill*.[91] The lower court overturned a state administrative decision on the grounds that the members of the agency were biased.[92] The lower court based its holding on two findings: personal pecuniary interest and a combination of functions. The Supreme Court affirmed, pointing to the possible pecuniary interest. The Court withheld discussion of the second due process claim, however, stating that:

> [t]he extent to which an administrative agency may investigate and act upon the material facts of a case and then, consistent with due process, sit as an adjudicative body to determine those facts has occasioned some divergence of views among federal courts.[93]

This contradicts Davis's assertion that the case law rejects the finding of due process violations in the combination of inconsistent functions, thereby casting doubt upon the continued viability of *Marcello*.

Even Davis admits that a few cases do exist which find due process violations in a combination of functions. These cases cannot be dismissed, however, as the exceptions which prove the rule. Many courts now clearly and forcefully hold that the combination of adjudication with investigatory or prosecutory functions per se breaches the parties' due process right to a fair and impartial hearing.[94] The language of the

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[89]*E.g.*, Boullioun v. Little Rock, 176 Ark. 489, 3 S.W. 334 (1928); Griggs v. Board of Trustees, 61 Cal. 2d 93, 389 P.2d 722, 37 Cal. Rptr. 194 (1964); Mackler v. Board of Educ., 16 N.J. 362, 108 A.2d 854 (1954); State *ex rel.* Lilliard v. Humphreys, 163 Tenn. 20, 40 S.W.2d 405 (1931). Often these decisions cite no authority. *E.g.*, Boullioun v. Little Rock, *supra*; State *ex rel.* Lilliard v. Humphreys, *supra*. One of the above cases has been substantially overruled. *Compare* Mackler v. Board of Educ., *supra*, *with* Hoek v. Board of Educ., 75 N.J. Super. 192, 182 A.2d 577 (App. Div. 1962).

[90]Tarr v. Hallihan, 375 Ill. 38, 30 N.E.2d 421 (1940) (the combination was not vested in the same individual); Smith v. State Bd. of Accountacy, 271 S.W.2d 875 (Ky. 1954) (appellant received trial de novo); Gray Well Drilling Co. v. State Bd. of Health, 263 Wis. 417, 58 N.W.2d 64 (1953) (lack of proof that combination existed).

[91]411 U.S. 564 (1972), *aff'g* 311 F. Supp. 122 (M.D. Ala. 1971).

[92]311 F. Supp. 122 (M.D. Ala. 1971).

[93]411 U.S. at 579 n.17.

[94]*E.g.*, Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962); NLRB v. Phelps, 136 F.2d 562 (5th Cir. 1943); Berkshire Employees Ass'n v. NLRB, 121 F.2d 235 (3d Cir. 1941); Mack v. Florida State Bd. of Dentistry, 296 F. Supp. 1259 (S.D. Fla. 1969); Abrams

courts is unmistakable. "It would seem to be beyond human experience and expectation for impartiality to result where the officer is the investigator, prosecutor, witness and trier of facts . . . ."[95] These cases represent a growing body of law finding a fundamental constitutional transgression occurring when there is a combination of functions.

It cannot yet be stated that the case law represents a total acceptance of this view. However, many jurisdictions are declaring a per se constitutional infringement when presented with a combination of functions problem.[96] The remaining courts, with few exceptions,[97] now approach combination facts with considerable mistrust,[98] closely scrutinizing them to determine if a decision has been made either following a prejudgment of central factual issues or based upon *ex parte* information.

Courts are recognizing that a combination of functions presents a "danger signal" which they must heed.[99] The cases usually announce that they "decline to establish a *per se* rule."[100] They are forced to admit,

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v. Jones, 35 Idaho 532, 207 P. 724 (1922); Mank v. Board of Fire & Police Comm'rs, 7 Ill. App. 3d 478, 288 N.E.2d 49 (1972); Sandahl v. Des Moines, 227 Iowa 1310, 290 N.W. 697 (1940); Hoek v. Board of Educ., 75 N.J. Super. 192, 182 A.2d 577 (App. Div. 1962); Gardner v. Repasky, 434 Pa. 126, 252 A.2d 704 (1969); *In re* Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961); State *ex rel.* Beam v. Fulwiler, 76 Wash. 2d 313, 456 P.2d 322 (1969); State *ex rel.* Ellis v. Kelly, 145 W. Va. 70, 112 S.E.2d 641 (1960); *cf.* Reardon v. Dental Comm'n, 128 Conn. 116, 20 A.2d 622 (1941); Hanna v. Board of Aldermen, 54 R.I. 392, 173 A. 358 (1934).

[95]State *ex rel.* Ellis v. Kelly, 145 W. Va. 70, 112 S.E.2d 641, 644 (1960).

[96]*See* cases cited note 94 *supra*.

[97]The exceptions fall into two categories; those cases rejecting claims without closely examining the facts to determine if any bias took place; *e.g.*, Estrin v. Moss, 221 Tenn. 657, 430 S.W.2d 345 (1968), *appeal dismissed*, 393 U.S. 318 (1969); Rudolph v. Athletic Comm'n, 177 Cal. App. 2d 1, 1 Cal. Rptr. 898 (Dist. Ct. App. 1960), and those cases (majority) which, while rejecting the due process claims, make a finding similar to that of the Texas courts; *e.g.*, Firemen's & Policemen's Civil Serv. Comm'n v. Hamman, 404 S.W.2d 308, 312 (Tex. 1966) ("We do not hold that under no facts or circumstances would a combination of investigatory and adjudicatory functions constitute a denial of due process of law; we hold that there has been no denial here.").

[98]*See* notes 103 & 108 *infra*.

[99]*E.g.*, Twigger v. Schultz, 484 F.2d 856 (3d Cir. 1973); Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973); Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 94 S. Ct. 1617 (1974); United States v. Litton Indus., Inc., 462 F.2d 14 (9th Cir. 1972); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Hawkins v. Common Council, 192 Mich. 276, 158 N.W. 953 (1916); Wasniewski v. State Civil Serv. Comm'n, 7 Pa. Commw. 166, 299 A.2d 676 (1973). *See* Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 1, 56 (1970).

[100]Duke v. North Texas State Univ., 469 F.2d 829, 834 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); *accord*, Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973); *cf.* Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 94 S. Ct. 1617 (1974).

however, that "[t]he possibility of improper taint from such dual functions is substantial . . . ."[101] These courts then strictly examine the facts to determine if the individual has either "prejudged"[102] the case or has used "*ex parte*"[103] information in arriving at his decision. The outcome of this inquiry is determinative of each case's final resolution.[104] It is necessary, therefore, to determine what facts will support a finding of prejudgment or a decision based on *ex parte* information. Unless there has been reliance upon the doctrine of necessity,[105] no case has been found in which a court, after finding such prejudgment, has not overturned the decision of the administrative body or disqualified the individual involved.[106] Courts finding administrative decisions based upon *ex parte* information have been almost as unanimous in their orders for remand.[107]

"The law is clear that where a present interest in maintaining an earlier position inhibits the free exercise of the decider's mind when the moment of determination arrives, disqualification is an appropriate

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[101]Twigger v. Schultz, 484 F.2d 856, 861 (3d Cir. 1973); *see, e.g.*, Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

[102]Twigger v. Schultz, 484 F.2d 856 (3d Cir. 1973); Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973); Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 94 S. Ct. 1617 (1974); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Hawkins v. Common Council, 192 Mich. 276, 158 N.W. 953 (1916); Wasniewski v. State Civil Serv. Comm'n, 7 Pa. Commw. 166, 299 A.2d 676 (1973).

[103]United States v. Litton Indus., Inc., 462 F.2d 14 (9th Cir. 1972); Camero v. United States, 375 F.2d 777 (Ct. Cl. 1967); State Bd. of Optometrists v. Nemitz, 21 N.J. Super. 18, 90 A.2d 740 (App. Div. 1952); McCaughtry v. Real Estate Comm'n, 82 N.M. 116, 477 P.2d 292 (1970).

[104]*Violation found*: Twigger v. Schultz, 484 F.2d 856 (3d Cir. 1973); Sullivan v. Houston Independent School Dist., 475 F.2d 1071 (5th Cir. 1973); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Camero v. United States, 375 F.2d 777 (Ct. Cl. 1967); Hawkins v. Common Council, 192 Mich. 276, 158 N.W. 953 (1916); State Bd. of Optometrists v. Nemitz, 21 N.J. Super. 18, 90 A.2d 740 (App. Div. 1952); McCaughtry v. Real Estate Comm'n, 82 N.M. 116, 477 P.2d 292 (1970); Wasniewski v. State Civil Serv. Comm'n, 7 Pa. Commw. 166, 299 A.2d 676 (1973).

Violation not found: Duke v. North Texas State Univ., 469 F.2d 829 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); Kennecott Copper Corp. v. FTC, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 94 S. Ct. 1617 (1974); United States v. Litton Indus., Inc., 462 F.2d 14 (9th Cir. 1972) (turned on exhaustion point).

[105]The rule of necessity requires that a particular biased tribunal not be disqualified for bias if it is the only body which has jurisdiction over the case. The doctrine does not apply if there is some means of curing the bias such as disqualifying biased members while leaving a quorum for action. K. Davis, *supra* note 75, at § 12.05.

[106]See note 102 *supra*.

[107]See note 103 *supra*.

remedy . . . ."[108] The "earlier position" must involve one of the ultimate factual issues before the agency.[109] Once this determination has been made, the disqualification of the biased participant is ordered.[110] Courts have found the requisite prejudgment in an individual's previous statements[111] or acts,[112] and often hold that a "suspicion of prejudgment" or an "appearance of bias" will meet the burden of proof.[113]

It is not necessary for disqualification that an individual has prejudged the the ultimate factual issue of the case. "It would appear to be sufficient that he has received extra-record evidence that will tend to affect his resolution of such factual issues as eventually do arise."[114]

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[108]Air Transport Ass'n of America v. Hernandez, 264 F. Supp. 227, 232 (D.D.C. 1967); *see* Comment, *Prejudice and the Administrative Process*, 59 Nw. U.L. Rev. 216 (1964); Note, *Disqualifications of Administrative Officials for Bias*, 13 Vand. L. Rev. 712 (1960).

[109]*Compare* Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970); Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966); Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated & remanded per curiam*, 381 U.S. 739 (1965), *on remand*, 383 F.2d 942 (1967) (prior result reached), *rev'd & remanded*, 393 U.S. 223 (1968); Air Transport Ass'n of America v. Hernandez, 264 F. Supp. 227 (D.D.C. 1967); Smith v. Department of Registration & Educ., 412 Ill. 332, 106 N.E.2d 722 (1952) *with* FTC v. Cement Inst., 333 U.S. 683 (1948); United States v. Morgan, 313 U.S. 409 (1941) *and* Skelly Oil Co. v. FPC, 375 F.2d 6 (10th Cir. 1967), *aff'd in part & rev'd in part sub nom.* Permian Basin Area Rate Cases, 390 U.S. 747 (1968). For an excellent example of the weighing of the amount of involvement necessary to bring about a finding of prejudgment, see Kelly v. Wyman, 294 F. Supp. 893, 907 (S.D.N.Y. 1968), *aff'd sub nom.* Goldberg v. Kelly, 397 U.S. 254, 271 (1970). In addition there *seems* to be a requirement that whatever knowledge one has gained which has caused the prejudgment must have come from an extra-hearing source. Therefore, having previously tried the same case will not be grounds for prejudgment. See note 86 *supra*.

[110]Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964); Air Transport Ass'n of America v. Hernandez, 264 F. Supp. 227 (D.D.C. 1967); Smith v. Department of Registration & Educ., 412 Ill. 332, 106 N.E.2d 722 (1952); *see* United States v. Grinnell Corp., 384 U.S. 563 (1966); Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

[111]Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964); Air Transport Ass'n of America v. Hernandez, 264 F. Supp. 227 (D.D.C. 1967); Smith v. Department of Registration & Educ., 412 Ill. 332, 106 N.E.2d 722 (1952).

[112]Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966).

[113]*See, e.g.*, Twigger v. Schultz, 484 F.2d 856 (3d Cir. 1973); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966).

[114]Comment, *Prejudice and the Administrative Process*, 59 Nw. U.L. Rev. 216 (1964).

> The dedication of American society to an ideal of government under law and its abhorence of personalized regulation have been manifested in the concern shown for establishing proper regulation of ex parte communications with the personnel of administrative organizations.

Id. at 224; Peck, *Regulation and Central Control of Ex Parte Communications with Administrative Agencies*, 76 Harv. L. Rev. 233 (1962); *see* 1 R. Benjamin, Administrative Adjudication in the State of New York 207 (1942); 2 K. Davis, *supra* note 76, § 13.12,

Further, the cases demand that "[a]ll parties must be fully appraised of the evidence submitted. . . . In no other way can a party maintain its rights . . . ."[115] It is also held that "nothing may be treated as evidence which has not been introduced as such."[116] When deciding officers have been influenced by facts not presented during the hearing, the courts have almost unanimously remanded the case, disqualifying the individual.[117]

If faced with a claim that the combination of the duties of the state Comptroller violated due process, the Mississippi Supreme Court would doubtless be guided by a desire to maintain harmony with the overwhelming case law and to uphold its own directive that administrative procedures must be "consistent with the essentials of a fair trial."[118] This desire would induce the court to use one of two conceptual paths to analyze the case. A trip down either path leads to the same destination, however—an order disqualifying the Comptroller from sitting as a member of the Board.[119] Should the court choose to follow the per se disquali-

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at 465 (Supp. 1970); W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 31 (1972); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW CASES AND COMMENTS 875 (4th ed. 1960); Fuchs, *The Hearing Officer Problem—Symptom and Symbol*, 40 CORNELL L.Q. 281, 294 (1955); Comment, *South Dakota's Administrative Procedure Act and the Bank Charter Application: Is It a "Contested Case?"*, 17 S.D.L. REV. 394, 413 (1972).

[115]ICC v. Louisville & N.R.R., 227 U.S. 88 (1913).

[116]La Prade v. Department of Water & Power, 27 Cal. 2d 47, 162 P.2d 13 (1945).

[117][T]he hearer . . . is bound in conscience to consider the evidence, and to be governed by that alone . . . . It strikes at the very foundation of justice to obtain what purports to be factual information bearing upon the substance of the issues by consulting informed persons not brought into the inquiry. Essential justice would be a vain pursuit were not this the inexorable rule.

Application of Plainfield-Union Water Co., 11 N.J. 382, 94 A.2d 673, 677 (1953); *see, e.g.*, ICC v. Louisville & N.R.R., 227 U.S. 88 (1913); Twigger v. Schultz, 484 F.2d 856 (3d Cir. 1973); United States v. Litton Indus., Inc., 462 F.2d 14 (9th Cir. 1972); Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959); Brown-Pacific-Maxon Co. v. Toner, 255 F.2d 611 (7th Cir. 1958); English v. Long Beach, 35 Cal. 2d 155, 217 P.2d 22 (1950); La Prade v. Department of Water & Power, 27 Cal. 2d 47, 162 P.2d 13 (1945); Garces v. Department of Registration & Educ., 254 N.E.2d 622 (Ill. 1969); Bostey v. Quigley, 189 Md. 493, 56 A.2d 835 (1948); Harris v. Board of Registration in Chiropody (Podiatry), 343 Mass. 536, 179 N.E.2d 910 (1962); Moran v. School Comm., 317 Mass. 591, 59 N.E.2d 279 (1945); Brotherhood of R.R. Trainmen v. Palmer, 47 N.J. 482, 221 A.2d 721 (1966); Kachen v. Consolidated Police & Fireman's Pension Fund Comm'n, 71 N.J. Super. 463, 177 A.2d 304 (App. Div. 1962); *cf.* Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937); United States v. Abilene & So. Ry., 265 U.S. 274 (1924). *But see* State *ex rel.* Hotel Continental v. Burton, 334 S.W.2d 75 (Mo. 1960) (court held reception of *ex parte* information was a bad practice but did not overturn because it felt that the evidence only had a cumulative effect).

[118]Planters Bank v. Garrott, 239 Miss. 248, 279, 122 So. 2d 256, 268 (1960).

[119]Twice, the issue of partial state banking boards has been brought before other state courts. In Farb v. State Banking Bd., 343 S.W.2d 508 (Tex. Civ. App. 1961), the court was presented not with a true combination of functions issue, but with an apparent bias

fication rule, functions as inconsistent as those the Comptroller is statutorily forced to administer would definitely result in a finding of disqualification. Alternatively, should the court choose to scrutinize strictly the facts to determine if prejudgment existed or if the decision was based on *ex parte* information, it would also order disqualification. The Comptroller is ordered by statute to prejudge the ultimate factual issue; public necessity.[120] This degree of prejudgment is as great, if not greater, than any found in the many cases which have resulted in disqualification.[121] How can a party expect to receive a fair hearing when a voting and influencing member of the Board has been forced to decide the issue in controversy before the hearing began? In addition, since the Comptroller is ordered to conduct an independent investigation, it is quite likely that in making his final decision he will rely on some information gleaned from that investigation which was not introduced at the hearing and which the parties had no opportunity to refute. Whether the court chooses the per se rule or the "danger signal" approach, it should reverse and remand all agency decisions where there exists a combination of functions and disqualify the Comptroller from sitting as a member of the Board.[122] The legislature could resolve the matter,[123] and hopefully

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on the part of one of the members of the Board. The claim was also not the major contention of the appealing party and was sidestepped when the court declared they would not examine the "motives" of one of the members of the Board. The court was not faced with as clear a case of combination, prejudgment, and *ex parte* information as would be available to a conscientious appellant under the Mississippi banking laws. In Application of State Bank of Plainfield, 61 N.J. Super. 150, 160 A.2d 299 (App. Div. 1960), the claim was that the deciding officer relied in part on information gathered in an independent investigation. The court, however, held that *all* the information (as opposed to only a report and recommendation in Mississippi) had been entered into the record. Both cases are distinguishable from the factual situation that would be involved in a Mississippi case, since Section 81-3-13(1) of the Mississippi Code of 1972 requires the comptroller to make a prejudgment. Moreover, the *Farb* court just refused to meet the issue before it and the *Bank of Plainfield* case is against the clear weight of authority. See note 117 *supra*.

[120]MISS. CODE ANN. § 81-3-13 (1972).

[121]See note 117 *supra*.

[122]The Mississippi Supreme Court recently found a public service commissioner biased but failed to order a new hearing because the decision was supported by substantial evidence. Mississippi Pub. Serv. Comm'n v. Albama Great So. R.R., No. 47,616 (Miss., May 6, 1974). This language fails to confront the real issue: The denial of an impartial (unbiased) hearing is a denial of a hearing itself. Agencies are empowered to use their discretion; when that discretion is tainted by bias no amount of substantial evidence can cure the lack of the impartial hearing. It is possible, however, that the court just did not find real prejudgment of the ultimate factual issue. Policy bias (a desire to see more railroad crossing gates) as distinguished from prejudgment of an ultimate factual issue (the existence of a public necessity) does not require removal of the hearing officer nor remand of the case. Since the court did not cite any authority to support its holdings, it is difficult to tell whether they found that prejudgment of an ultimate factual issue did not exist or that such prejudgment did exist but was cured by substantial evidence sup-

the court will not be forced to reach such a decision.

"Improvements in the fairness of agency adjudication will not come until agency members frankly acknowledge, and conscientiously seek to avoid, the dangers inherent in the fusion of functions within the agency process."[124] Before the issue of this fusion of functions in the Comptroller can be raised, timely motion requesting that he be excused must be made. There are five reasons which should convince the Board and the Comptroller to seriously consider such a motion. First, it will be impossible for the Comptroller to objectively analyze a case when he has been statutorily forced to decide the ultimate issue before he has heard the evidence of either party.[125] Second, to the degree the Comptroller tries to compensate for his acknowledged bias, the efficient performance of his responsibilities will be compromised.[126] Third, whether he unintentionally allows his bias to influence his decision or whether he recognizes and overcompensates for it, it is very possible that a decision concerning a new bank will be reached based upon considerations other than whether there is a public necessity. Fourth, whether or not actual bias exists, the obvious appearance of that bias acts as a deterrent to the cooperation with the public so necessary to the other functions of the

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porting the decision. The first interpretation is consistent with the case law; the second is not.

If the court is holding that prejudgment may be cured by substantial evidence, they have negated the requirement that agencies must provide impartial hearings. The new requirement would be that impartial hearings are only needed if the decisions of the agency are not supported by substantial evidence. Most likely the court did not intend the last paragraph of a rather lengthy opinion to be so interpreted. The language, however, clearly lends itself to that interpretation. This confusion needs to be resolved—a Banking Board appeal would provide the perfect forum for such a resolution.

[123]This legislation could best be part of a statewide Administrative Procedure Act which would eliminate these fundamental due process problems from all of the states' many administrative agencies.

[124]Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652, 655 (1965); *see* 1 R. BENJAMIN, *supra* note 114, at 64; 2 K. DAVIS, *supra* note 76, at § 13.01; ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE IN GOV'T AGENCIES, FINAL REPORT, S. DOC. No. 8, 77th Cong., 1st Sess. (1941). For a discussion of the general historical development of the concept of separation of functions, see Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947); Comment, *The Disqualification of Administrative Officials*, 41 COLUM. L. REV. 1384 (1941); Comment, *Prejudice and the Administrative Process*, 59 NW. U.L. REV. 216 (1964); Note, *Disqualification of Administrative Officials for Bias*, 13 VAND. L. REV. 712 (1960); 30 GEO. L.J. 54 (1941); 51 YALE L.J. 169 (1941).

[125]Psychology substantiates the danger that prejudice in the nature of a conscious or unconscious predilection may pose to objective analysis. The human mind establishes "sets and patterns of thinking with regard to a given subject on the basis of its experience therewith."

Comment, *Prejudice and the Administrative Process*, 59 NW. U.L. REV. 216, 224 n.5 (1964), *quoting from* D. WICKENS & D. MEYERS, PSYCHOLOGY 276-85 (1961). *See also* D. KRECH & R. CRUTCHFIELD, THEORY AND PROBLEMS OF SOCIAL PSYCHOLOGY 87 (1948); E. TOLMAN, PURPOSIVE BEHAVIOR IN ANIMALS AND MEN (1932).

[126]The administrator's own recognition of his dual position tends, in propor-

Banking Board.[127] And, finally, the possibility of future abuse of the Comptroller's function cannot be discounted. When faced both with the policy considerations urging disqualification and the apparent unconstitutionality of the present procedure, it would be wise indeed for the Comptroller, if requested, to excuse himself from sitting as an adjudicative member of the Board.

Regardless of the evident precedential value of *Marcello* and the rather broad statement of Professor Davis, the combination of functions in the Office of the Comptroller violates the due process right of parties to a fair and impartial hearing as given them by the statute. Presented with this issue, the Mississippi Supreme Court should recognize the violation. Sensing that outcome, however, and the positive policy considerations involved, the Comptroller, when requested, should excuse himself from sitting as a member of the Board.

B. Possible Pecuniary Interest

The banking statutes provide that one member of the Board should be an "active senior executive officer of a state chartered bank."[128] The statutes also provide a mechanism to excuse this member should an application be filed from "any village, town, city, or county of which [he] is a resident . . . ."[129] The only time a problem might arise is if an application should be filed from a political subdivision in which the Comptroller does not reside, but in which he has banking interests.[130] The case law clearly provides that the existence of the possibility of any pecuniary interest in the outcome of a decision demands that the individual be disqualified from hearing the case.[131] Even though the banking officer might be guided only by the highest moral scruples, it is difficult to imagine any semblance of fairness in a hearing before an individual who has an interest in a bank which would be financially harmed by the granting of the application.

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tion to his conscientiousness and his appreciation of the importance of procedure fair in appearance as well as in substance, to create a self-consciousness that interferes with the expeditious and effective performance of his quasi-judicial duties.

1 R. BENJAMIN, *supra* note 114, at 55.

[127]*See id.*

[128]MISS. CODE ANN. § 81-3-13 (1972).

[129]*Id.*

[130]This would obviously include not only the county, etc. where a bank he has an interest in is located but also any county, etc. within the "service or market area of that bank or any branch of it."

[131]Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927); Daly v. Town Planning & Zoning Comm'n, 150 Conn. 495, 191 A.2d 250 (1963); Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969); Savings & Loan Associates, Inc. v. Township of Washington, 61 N.J. Super. 312, 160 A.2d 635 (App. Div. 1960).

Another conflict would exist if one of the other members of the Board had an interest in a bank servicing an area which might be affected by the grant of the new application. These interests are difficult to detect; therefore, to alleviate all doubts of possible self-interest it would be appropriate for all members of the Board to make known their interest in any bank,[132] and also to disqualify themselves should those interests even remotely be affected. The obvious result of proof of such interest in a case where the member did not excuse himself would be remand by the court of the decision with orders to rehear the case absent participation by the biased member.

C. Cross-Examination of Investigator and Comptroller

After the Comptroller has completed his investigation, he submits a report which includes his recommendations to the Board at the commencement of the hearing. Requests to cross-examine the investigator have been denied; that denial has been upheld by the state supreme court.[133] Thus the court allows the findings of the Comptroller to be introduced into evidence absent any of the safeguards which cross-examination was designed to affect.

The attorney general claims these reports are confidential. There are few possible justifications for this confidentiality. One justification is to prevent disclosure of information regarding the moral character of the applicants. However, this is exactly the type of often baseless hearsay information which should be revealed so as to give the accused party an opportunity to present an adequate defense. The second justification is to protect the examiners and the department from the embarrassment that might flow from inaccurate or incomplete investigations. Obviously, this would lead to more thorough investigations. It has also been claimed that such confidentiality assists the investigator in acquiring information.

The court upholds the refusal to allow cross-examination by declaring that the statutory law[134] does not "contemplate" that the investiga-

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[132]It is quite possible that there are related interests which should also be disclosed. Any tangential business which derives profit from a particular bank which might be affected by the new bank should be disclosed and should also be grounds for disqualification.

[133]When a party made a motion to cross-examine the investigator:

> The Comptroller stated that the Attorney General had held that the information obtained in his survey was done for the benefit of the board and was therefore confidential. The board then overruled the motion. . . . The statute does not contemplate that the reports of those employed by the Comptroller to assist in his investigation should be a part of the evidence in a hearing before the board.

Britton & Koontz First Nat'l Bank v. Biglane, 285 So. 2d 181, 183-84 (Miss. 1973).

[134]Miss. Code Ann. § 81-3-13 (1972).

tors should be cross-examined.[135] It can also be said, however, that the Code does not "contemplate" that evidence should be presented absent the historical safeguard of cross-examination. As a matter of fact, the Code does not "contemplate" the situation at all. For this reason, both the court and the Board should take a more critical look at a rule which strips the parties of one of their most vital judicial protections.

The court has also ordered the Board to furnish copies of the Comptroller's report and recommendations to both parties at the beginning of each hearing "so they will have an opportunity to rebut the same by evidence."[136] How can either party effectively "rebut" the report and recommendations when they are denied access to both the investigator who compiled the information and the Comptroller who drew his conclusions from that information? The only way to realize the court's own goal of "rebuttal" is to allow cross-examination of both of these individuals.

When faced with a similar situation, the New Jersey Supreme Court did not allow an agency engineer to submit his written report to the agency unless he would take "the witness stand . . . thereby affording the parties in interest an opportunity to test and perhaps dispute his supposed knowledge."[137] The court added that cross-examination is one of the "basic elements of the hearing essential to due process." The vast majority of jurisdictions do not allow a report to be presented to an administrative body unless the author of that report is available for cross-examination.[138]

"One of the indispensable requisites of a fair hearing is that . . . the party . . . shall have an opportunity to . . . cross-examine the witnesses against him."[139] The reason for the "indispensable" nature of cross-examination is that it is the only effective tool for testing the veracity of a witness, the accuracy of his perception, the extent of his

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[135]Britton & Koontz First Nat'l Bank v. Biglane, 285 So. 2d 181, 183-84 (Miss. 1973).

[136]*Id.* at 185. See text accompanying note 47 *supra*.

[137]Application of Plainfield-Union Water Co., 11 N.J. 382, 94 A.2d 673, 677-78 (1953); *accord*, Goldberg v. Kelly, 397 U.S. 254 (1970).

[138]Bereda Mfg. Co. v. Industrial Bd., 275 Ill. 514, 114 N.E. 275 (1916); People *ex rel.* Binghamton Light, Heat & Power Co. v. Stevens, 203 N.Y. 7, 86 N.E. 114 (1911); Lindsey v. Public Util. Comm'n, 111 Ohio St. 6, 144 N.E. 729 (1924); *see* Chicago Bd. of Trade v. FTC, 233 F.2d 348 (D.C. Cir. 1955); Civil Serv. Comm'n v. Polito, 397 Pa. 538, 156 A.2d 99 (1959); Snyder Mines, Inc. v. Industrial Comm'n, 117 Utah 471, 217 P.2d 560 (1950); *cf.* Buchwalter v. FTC, 235 F.2d 344 (2d Cir. 1956); Appeal of United States SEC 226 F.2d 501 (6th Cir. 1955); *In re* New England Power Corp., 103 Vt. 453, 156 A. 390 (1931). It is very difficult to find cases exactly on point involving this issue. Most agencies demand that the investigator be cross-examined. The cases, therefore, often involve only matters collateral to this.

[139]1 F. COOPER, *supra* note 79, at 361, *quoting* NLRB v. Prettyman, 117 F.2d 786, 790 (6th Cir. 1941).

observation, and the accuracy of his memory and narration.[140] The need for competent cross-examination of investigators is especially great because of the tendency of agency members to place more credence in the testimony of individuals employed by the agency when compared with ordinary witnesses.[141]

The efficiency of the Board would not be harmed[142] by demanding that the Comptroller and his investigators be subject to cross-examination.[143] Correspondingly, the procedural protection afforded to parties would be greatly enhanced. The Board should revise its policy.[144] Should it refuse this recommendation, the court, after closely examining the policy considerations and the appropriate case law, should overrule its recent decision,[145] thereby ensuring the cherished right of cross-examination for parties practicing before the Banking Board.[146]

D. Finding of Fact

The Mississippi statute does not require that the Board make "express" findings of fact to support its ultimate finding or conclusion. The only express finding of fact required under our statute is that the

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[140]1 R. BENJAMIN, *supra* note 114, at 194.

[141]"I have observed that on disputed issues of fact the testimony of an investigator is likely to be accepted against the conflicting testimony of other witnesses, particularly of interested witnesses." *Id.* at 76.

[142]The Federal Banking System until recently also had a policy of confidential investigative reports. After reading the following criticism of this policy by Professor Davis, the Comptroller of the Currency retracted that policy:

> I see no reason why the examiner's report . . . should not be made known to affected parties . . . . Both fairness and efficiency so require. Parties with substantial business interests at stake should have opportunity to correct mistakes and argue for different interpretations of factual materials.

Davis, *Administrative Procedure in the Regulation of Banking*, 31 LAW & CONTEMP. PROB. 713, 716 (1966). The report Professor Davis was discussing refers to the entire investigative record of the investigator as opposed to the Comptroller's summary report which, in our state, is given to parties during the hearings.

[143]The Comptroller delegates his duty of investigation to department examiners. These examiners, along with the Comptroller, are the individuals that should be subject to cross-examination. This delegation does not render ineffective any portion of the "combination of functions" argument in Part II A because the Comptroller still reviews the investigations of the examiners and makes his recommendation to the Board based upon them.

[144]See 1 R. BENJAMIN, *supra* note 114, at 202; 1 F. Cooper, *supra* note 79, at 361-63; 2 K. DAVIS, *supra* note 76, at § 14.15; ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE IN GOV'T AGENCIES, FINAL REPORT, S. DOC. No. 8, 77th Cong., 1st Sess. (1941); Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 41.

[145]Britton & Koontz First Nat'l Bank v. Biglane, 285 So. 2d 181 (Miss. 1973).

[146]It is common knowledge among attorneys regularly practicing before the Board that the Comptroller and/or the investigator have twice submitted to cross-examination. This procedure needs to be revived as a regular practice.

> Board shall determine whether the public necessity requires that the proposed new bank be chartered and permitted to operate.[147]

The court here requires only that the agency render a finding upon the ultimate issue before it. It obviously, therefore, does not require that "basic findings" be given. "[B]asic findings are those on which the ultimate finding rests; the basic findings are more detailed than the ultimate finding but less detailed than a summary of the evidence."[148] It is generally accepted that the efficiency of the administrative and the judicial process would only be improved by requiring agencies to explain their basic findings.[149]

Such a requirement would lead "to clear hard thinking on the part of agency members and their staffs."[150] It would "assure considered action"[151] and "more careful . . . consideration."[152] The Board would be forced to explain the findings upon which its decision is based. They would therefore be made to consider just which elements are necessary to a finding of public necessity.

The findings will "enable parties to judge for themselves the soundness of a decision,"[153] aiding them in determining whether any further judicial action should be taken. Should they decide to seek review of the decision, the findings will prove helpful in the preparation of the appeal.[154]

"Intelligent . . . review . . . is possible only if the deciding officer has made findings of fact which show the actual grounds of decisions."[155] No longer will appeals from Board decisions claim only procedural inconsistencies and the lack of "substantial evidence." Instead, the parties will be able to point exactly to the basic finding they believe incorrect, (*i.e.*, moral character of the incorporators) and claim that there is

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[147]Planters Bank v. Garrott, 239 Miss. 248, 272, 122 So. 2d 256, 265 (1960); *accord*, First Nat'l Bank v. Martin, 238 So. 2d 856, 859 (Miss. 1970).

[148]2 K. DAVIS, *supra* note 76, § 16.06, at 451. *But see* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW CASES AND COMMENTS (4th ed. 1960) wherein the authors state:

> To say that an agency must decide with clarity is not to say, however, that the agency must decide in the most minute detail. . . . Indeed, a lengthy recital of evidence, in place of a pointed indication of what the agency thinks the evidence shows, has been held to be a defect rather than a virture.

Id. at 1157-58.

[149]1 R. BENJAMIN, *supra* note 114, at 253; 1 F. COOPER, *supra* note 79, at 469; K. DAVIS, *supra* note 75, at §§ 16.01, 16.03; Davis, *supra* note 69, at 717; Fredman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PA. L. REV. 1, 80 (1970).

[150]1 F. COOPER, *supra* note 79, at 647.

[151]1 R. BENJAMIN, *supra* note 114, at 253.

[152]2 K. DAVIS, *supra* note 76, at § 16.03.

[153]1 R. BENJAMIN, *supra* note 114, at 253.

[154]2 K. DAVIS, *supra* note 76, at § 16.03.

[155]1 R. BENJAMIN, *supra* note 114, at 252.

not substantial evidence to support that finding. The parties will also be able to urge that the basic findings, taken together, do not support the final decision. It is impossible to have a true system of limited judicial review and not require basic findings of fact.[156] If a reviewing court is presented only with the hearing record and the ultimate finding of fact, it will be forced to substitute its judgment for what it imagines the agency concluded for each questioned basic point. For example, suppose an application is denied; the only finding was that a public necessity did not exist (this is the only finding required by the court). On review, the appellant points to evidence overwhelmingly showing that a public necessity does exist. The appellee, in passing, refers to the moral character of the applicants; the record is not clear on the subject. To decide whether the moral character issue was substantial enough to deny the application, the court is faced with having to substitute its judgment for that of the Board. The correct step for the court would be, as many other courts have done, to remand the case to the Board requiring that they make known their basic findings of fact.[157] Then, upon rehearing, the court would only have to decide if the agency's finding of moral character was supported by substantial evidence.

The Mississippi Supreme Court has spoken to this issue three times. In one case the court stated that basic findings were necessary "because . . . if an agency does not disclose the reason upon which its decision is based, the courts will be usurped of their power of review over

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[156]"A very large portion of the cases remanded for better findings are an inevitable result of the system of a limited judicial review." 2 K. Davis, *supra* note 76, at § 16.01.

[157]"We have repeatedly emphasized the need for clarity and completenesss in the basic or essential findings on which administrative orders rest." Colorado-Wyoming Gas Co. v. FPC, 324 U.S. 626, 634 (1945); *accord*, Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962); NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1956); King v. United States, 344 U.S. 254 (1952); United States v. Pierce Auto Lines, 327 U.S. 515 (1946); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Florida v. United States, 282 U.S. 194 (1931); Wingo v. Washington, 395 F.2d 633 (D.C. Cir. 1968); Braniff Airways, Inc. v. CAB, 306 F.2d 739 (D.C. Cir. 1962); NLRB v. Capital Transit Co., 221 F.2d 864 (D.C. Cir. 1955); California Motor Transp. Co. v. Public Util. Comm'n, 59 Cal. 2d 270, 379 P.2d 324, 28 Cal. Rptr. 868 (1963); Farnham v. Labutis, 147 Conn. 267, 160 A.2d 120 (1960); Polar Ice Cream & Creamery Co. v. Andrews, 150 So. 2d 504 (Fla. 1963); Brinker Trucking Co. v. Illinois Commerce Comm'n, 19 Ill. 2d 354, 166 N.E.2d 18 (1960); City of Calais v. Calais Water & Power Co., 157 Me. 467, 174 A.2d 36 (1961); McLairy v. Wagoner, 16 Mich. App. 326, 167 N.W.2d 800 (1967); County of Lancaster v. State Bd. of Equalization & Assessment, 181 Neb. 738, 150 N.W.2d 211 (1964); Application of Yellow Cab Co., 176 Neb. 711, 127 N.W.2d 211 (1964); Application of Skeedee Independent Tel. Co., 166 Neb. 49, 87 N.W.2d 715 (1958); *In re* Erie R.R., 19 N.J. 110, 115 A.2d 89 (1955); Reints v. Diehl, 303 P.2d 641 (Okla. 1956); Valley & S.R.R. v. Flag, 195 Ore. 683, 247 P.2d 639 (1962); Roseto v. County of Washington, 458 P.2d 405 (Ore. 1969); Hooper v. Goldstein, 241 A.2d 809 (R.I. 1968); Gray v. Laurens Mill, 231 S.C. 488, 99 S.E.2d 36 (1957); Miller v. Railroad Comm'n, 363 S.W.2d 244 (Tex. 1962).

questions of law."[158] The court, however, declined to require basic findings in each case. No reason has been given for this holding; most probably because there is no reasonable justification. This most recent decision followed by only 2 years the case in which the court held basic findings were not required to be given.[159] One probable explanation for the decision, therefore, was simply the reluctance on the part of the court to overrule itself.[160] Even though our court missed the opportunity to require basic findings, the Board, realizing the advantages in such a procedure, has begun to make a few such findings part of their opinions.[161] The Board needs now only to expand both the thoroughness and the number of these findings. The permanent institutionalization of such a policy would aid not only the Board but the parties and the courts as well.

E. Rulemaking

The Banking Board has not availed itself of the rulemaking procedures. The Board definitely has the authority to issue both interpretative and procedural rules.[162] Procedural rules serve as firm guides for the inexperienced practitioner and as tools to facilitate quick settlement of disputes involving perfunctory procedural matters. The rules should include how to, where, and when to file papers and to appear. Also, all

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[158]Illinois Cent. R.R. v. Jackson Ready-Mix Concrete, 243 Miss. 72, 83-84, 137 So. 2d 542, 545 (1962).

[159]Planters Bank v. Garrott, 239 Miss. 248, 122 So.2d 256, *suggestion of error overruled*, 123 So. 2d 240 (1960).

[160]*See* Planters Bank v. Garrott, 239 Miss. 248, 288-91, 122 So. 2d 256, 273-74 (1960) (dissenting opinion).

[161]On September 20, 1970, the Banking Board issued a written opinion and decision regarding the Natchez State Bank and Trust Company. Two express findings of fact were made: (1) appropriate age and business character of incorporators and (2) the existence of a public necessity. On October 24, 1972, in a decision regarding the Peoples Bank of Rankin County three findings were made: (1) the good moral character of the incorporators, (2) the economic growth of the area and possible success of the new bank, and (3) a public necessity. On August 22, 1973, in a decision regarding the application of the First State Bank and Trust Company of Oxford seven specific findings were made. They dealt mostly with procedural matters and included findings that all statutory requirements had been met, that no evidence was presented pointing toward the lack of a public necessity and the existence of that necessity.

[162]The question as to the power of an agency to adopt procedural rules is one which rarely arises. It would seem that the very delegation to an agency of power to administer a statute would carry with it the power to adopt such reasonable procedures as are necessary or useful in carrying out its administrative tasks.

. . .

It is equally clear that an agency may without specific statutory authority, make known its interpretations of the provisions of the statute it administers.

1 F. COOPER, *supra* note 79, at 176.

matters pertaining to the conduct of the hearing should be expressly stated for the benefit of both the parties and the Board.[163] Interpretative rules are rules "issued by an agency to advise the public of the agency's construction of the statutes . . . which it administers."[164] The Board should use this mechanism to declare what considerations it believes must contribute to a finding of "public necessity," including: an estimate of the assets which must be located in a community to support each bank, how those assets are to be determined, must an applicant show that his bank will bring "new" money into the community as opposed to just redistributing what already exists, just what are the most important considerations (people, money, etc.), and how much of each is needed.

Many advantages would flow from rules outlining what the Board believes constitutes a "public necessity." The Board itself would be educated as it discussed and decided the major requirements. The procedure of issuing rules, coupled with giving basic findings of fact, would enable the Board to construct a solid body of law concerning the organization of state banks. This would result in fewer meritless applications and thus less work for the Board. On the other hand, the approach of the existence of a public necessity in a given area would be apparent to more individuals, causing more applications for the area and producing the strongest possible new bank. Effective rules, coupled with the recommended procedural changes, would reduce time-wasting appellate review. In addition, both the banking industry and the public would be able to make known their disagreements with the rules, applying pressure for change in a manner detached from the acceptance or rejection of a particular application.[165]

This procedure is so superior[166] that a trend is developing where courts are remanding administrative decisions, demanding that the agency construct appropriate rules to guide their discretion.[167] Recognizing this phenomena, one court explained that there exists

> an incipient but powerful trend in the law—a new refusal to rely blindly

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[163]*See id.* at 173.

[164]K. DAVIS, *supra* note 75, § 5.03, at 126.

[165]Professor Davis, when making this same argument to the Federal Comptroller of the Currency said: "The Rules should say what can feasibly be said about the policies that govern the granting and denying of charters." Davis, *supra* note 69, at 719.

[166]*See* 1 R. BENJAMIN, *supra* note 114, at 10-11; J. LANDIS, THE ADMINISTRATIVE PROCESS 80 (1938); Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652, 654 (1965).

[167]*See* K. DAVIS, *supra* note 75, at § 2.09, *citing* United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971); Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969); Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968); Hornsby v. Allen, 326 F.2d 606 (5th Cir. 1964); Smith v. Ladner, 288 F. Supp. 66 (S.D. Miss. 1968).

> upon the unstructured exercise of official discretion and a new judicial willingness to require promulgation of and obedience to rules by administrative agencies.[168]

There are two principal reasons why this tool may never be utilized. First, the investment of time would be substantial. Most of the research, investigation, and formulation of alternatives, however, could be done by the staff. The Board would only be faced with deciding between these alternatives. Second, there is a natural fear of the binding effect of rules. The purpose of these rules, however, is not to confine the Board; it is to publicize what considerations the Board feels are important. Should these considerations change, the Board could change the rules. Should the Board be presented with unusual circumstances, it could, in good faith, distinguish the rules. And finally, upon review, though rules are often very influential, they only have a persuasive effect upon the courts.[169]

After the Board reaches tentative agreement upon the rules, it should publish them and invite comments from the public. Then, after considering these comments, it should issue the rules with a reasonable waiting period before the effective date. The publication and distribution should be sufficiently widespread so that all interested parties could become aware of their existence and their content. There is nothing magic about this procedure. It is only important that concerned individuals be given an opportunity, prior to the effective date, to express their opinions, and that the rules receive adequate distribution.

It is difficult to perceive that our Banking Board will not recognize the advantages inherent in and incidental to the use of a rulemaking procedure. The opportunities to decrease both the courts' workload and their own, to be the architects of a stout body of banking law, and to provide the citizens of this state with the strongest possible financial institutions, all should convince them to begin use of this procedural device.

Conclusion

It is hoped that this article will give assistance to the practicing attorney. Our state has had too few definitive articles touching upon practice before our various agencies. It appears that our practice, both on a state and federal level, is turning more toward administrative practice.

In considering, accepting, or rejecting each respective suggestion

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[168]United States v. Bryant, 439 F.2d 642, 652 n.22 (D.C. Cir. 1971).

[169]United States v. Correll, 389 U.S. 299 (1967); Commissioner v. South Tex. Lumber Co., 333 U.S. 496 (1948); Young v. Charity Hosp., 226 La. 708, 77 So. 2d 13 (1954).

made herein, the purpose of all of the banking laws must be kept firmly in mind: to provide the citizens of this state the soundest possible system of banking institutions. It should be the goal of the Board and of the courts to strive to achieve this purpose while providing the greatest possible procedural safeguards consistent with the efficient operation of the agency. It is with this purpose and this goal foremost in mind that these suggestions are offered. It is sincerely hoped that this is the spirit in which they are received.

The foregoing suggestions and discussions were drawn from the consideration of only one of our state's many administrative agencies. Procedural problems similar to those found here also exist in each of the other agencies. The singling out and close examination of the procedures of each will most likely never occur. This example, therefore, must be seen as emphatically underscoring the need for a statewide administrative procedure act. Such acts are not panaceas. They serve well, nevertheless, as structures upon which struggling agencies and courts can build administrative procedures for each agency which will lead to that ultimate balance of efficiency and fairness.

ADDENDUM A

CHART OF STATE AND NATIONAL BANKS GRANTED IN MISSISSIPPI

April 1, 1974

Year	*State Banks Chartered*	*National Banks Chartered*	*Total*
1934	2	0	2
1935	1	0	1
1936	1	0	1
1940	1	0	1
1941	1	0	1
1943	1	0	1
1944	1	1	2
1946	0	1	1
1947	1	1	2
1949	1	0	1
1951	1	0	1
1952	1	0	1
1953	0	1	1
1955	0	1	1
1961	1	0	1
1963	0	1	1
1964	0	2	2
1965	0	2	2
1966	0	2	2
1968	0	1	1
1970	2	1	3
1971	1	1	2
1972	5	1	6
1973	7	1	8
Total	28	17	45

(In year 1974 two hearings have been had and no decisions rendered therein at present time. They are under advisement of the Board. In addition thereto there are presently 19 applications filed and pending with the Board.)

ADDENDUM B

DEPARTMENT OF BANK SUPERVISION
STATE OF MISSISSIPPI
BOX 731
JACKSON, MISSISSIPPI 39205

BANKING BOARD HEARING

AGENDA
November 1, 19__ - 10 A.M.

1. Meeting called to order.
2. Application of First Usury Bank of University, Mississippi.
3. Notices placed in record.
4. Ask identity of parties in support and opposition.
5. Any preliminary motions to be heard or any other pleadings.
6. Swearing in all witnesses.
7. Comptroller to present findings and recommendations.
8. Opening statements.
9. a. Testimony on behalf of proponents.
   b. Cross-examination by opponents.
10. a. Testimony on behalf of opponents.
    b. Cross-examination by proponents.
11. a. Rebuttal testimony, if any, by proponents.
    b. Cross-examination, if any, by opponents.
12. Any additional examinations or testimony by interested parties.
13. Poll of Board.
14. Oral argument by proponents.
15. Oral argument by opponents.
16. Rebuttal argument by proponents.
17. Executive Session.
18. Adjournment of hearing.

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COMMENTS

COOK V. HUDSON: THE STATE'S INTEREST IN INTEGRATION VERSUS THE FIRST AMENDMENT RIGHTS OF THE PUBLIC SCHOOLTEACHER

The controversy began when the public school officials of Calhoun County, Mississippi, refused to rehire three teachers—Mr. Billy Cook, Mrs. Loula Adams, and Mrs. W. P. Wright—for the 1973-74 school year. The teachers were denied reemployment for enrolling their children in a private, all-white academy, in violation of a school board policy requiring children of public schoolteachers to attend the public schools.[1] The result was *Cook v. Hudson*,[2] an unusual and important decision which resolved the conflicting demands of the 1st and 14th amendments by upholding the school board's policy and refusing to reinstate the dismissed teachers.

In 1968, effective desegregation had come to the Calhoun County public school system. As the result of a school desegregation suit, the public school system of the county, which had previously operated as a racially distinct dual system, was ordered to convert to a unitary system. Geographic zoning of the first three grades was ordered for the 1968-69 school year, with the remaining grades to convert to a unitary system by the 1969-70 school year.[3]

At no time prior to the 1968 order had a private school, either secular or parochial, ever existed in Calhoun County. Within 1 month of the court's desegregation order, however, Calhoun Academy, a private, secular school, was founded.[4] The conclusion that Calhoun Academy was and remains a "racially discriminatory institution formed in the wake of public school desegregation to provide a haven for segregated education"[5] seems well-founded, even aside from the proximity of its establishment to the desegregation order. In its almost 6 years of

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[1]The entire policy was:

> Prior to the employment of a new teacher, or the reemployment of an existing teacher, the children of any such teacher, if living in Calhoun County, Mississippi, would be required to attend the public schools of said Calhoun County, or said teachers would not be employed or reemployed.

Cook v. Hudson, 365 F. Supp. 855, 857 (N.D. Miss. 1973). This statement of school policy was oral, never being transcribed into the School Board minutes.

[2]365 F. Supp. 855 (N.D. Miss. 1973).

[3]United States v. Calhoun County Bd. of Educ., WC 6637 (N.D. Miss., Aug. 9, 1968). Prior to the 1968 order, nominal desegregation had been achieved under a freedom-of-choice plan. The failure of freedom-of-choice to eliminate the dual system in Calhoun County occasioned the comprehensive 1968 order. 365 F. Supp. at 856.

[4]365 F. Supp. at 856.

[5]*Id.* at 857.

existence, Calhoun Academy has never accepted a black student. No black has ever served on the school's faculty or staff.[6] Further, because of its racial policies, the academy has been denied tax-exempt status[7] and is not qualified to receive state-owned textbooks pursuant to the Supreme Court's modification of Mississippi's textbook program in *Norwood v. Harrison*.[8] Finally, the school has received, since its inception, significant financial support from the local chapter of the White Citizen's Council,[9] whose motto of "Racial Integrity and States Rights" adequately summarizes its position.

By 1972 eight teachers in the Calhoun County public schools had chosen the academy for the education of their own children. In November of 1972, the Calhoun County Board of Education, on the advice of its attorney and with the approval of the Justice Department,[10] adopted the oral policy which required as a condition of employment that all teachers in the Calhoun County public school system with school-age children enroll those children in the Calhoun County public schools. The logic of the board and public school officials was straightforward: Under the 1968 desegregation order, the board was obligated to promote a unitary school system. Public schoolteachers with children in private schools, the board felt, would suffer from divided loyalties that must adversely affect job performance. To remain totally dedicated to the success of public education, the board believed, teachers must place their own children within the public system.[11] The board felt, moreover, that parents with children in the private schools would be prejudiced against public education, and that such an expression of prejudice by a teacher would harm students, particularly black students, in the public schools.[12] The board's concern for the educational well-being of students in the public schools had been spurred by its receipt of frequent complaints from students and their parents concerning those public schoolteachers who had children in Calhoun Academy.[13]

The meaning of the rule as adopted seems not to be in harmony

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[6]*Id.* at 856.

[7]*Id.* at 857; *see* Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) (mem.).

[8]413 U.S. 455 (1973); *see* Cook v. Hudson, 365 F. Supp. 855, 857 (N.D. Miss. 1973).

[9]*See* Record, vol. 2, at 25-30, Cook v. Hudson, 365 F. Supp. 855 (N.D. Miss. 1973) [hereinafter cited as R.2d].

[10]Record, vol. 1, at 198-201, Cook v. Hudson, 365 F. Supp. 855 (N.D. Miss. 1973) [hereinafter cited as R.].

[11]*Id.* 28, 154-55.

[12]R.2d 7-9. At the trial, two experts in the field of educational psychology, Dr. Francis Eicke and Dr. Grady Harlan, testified as to the benefits which the challenged policy would render to the educational process. R. 107-51. The substance and importance of these benefits will be considered at length later.

[13]R.2d 24.

with its intended effect. It seems likely that, at the time of passage of the policy, the board was concerned only with Calhoun Academy, and that the policy was intended to apply solely to it. Apparently, no other private school was contemplated.[14] The regulation as enacted, however, drew no distinctions among private schools; it applied equally to *all* nonpublic educational institutions. Further, Robert Hudson, principal of Calhoun City Attendance Center, on whom much of the burden of enforcing the policy would fall, intended to enforce it according to its literal terms.[15]

The policy was spread by word of mouth to the teachers in the public school system. Some of the teachers with children enrolled in Calhoun Academy agreed to comply with the policy; three others, Billy Cook, Loula Adams, and Mrs. W.P. Wright, did not withdraw their children from the academy. Consequently, when their contracts expired at the end of the 1972-73 school year, they were not renewed.

Seeking reinstatement, the three teachers brought suit in the United States District Court for the Northern District of Mississippi, before Chief Judge William C. Keady.

At trial, the plaintiffs explained their reasons for sending their children to Calhoun Academy. For Mr. Cook, the calmer environment and smaller classes of the private school were appealing. Too, Mr. Cook feared that he would be unable to treat his children impartially if they attended a school where he taught, even though Mr. Cook instructed at the high school level and his oldest son was age 7.[16] Mrs. Adams explained that she wanted her child to have religious training, which was not offered at the public school, and that her child suffered from a speech defect and hence needed more individual attention than he could receive in the public school.[17] Mrs. Wright testified that religious training and the calmer environment to be found in the private school played an important part in her decision also. Too, the Wright children live within walking distance of the private school but would have to be transported to the public school by bus.[18] Mrs. Wright testified that she actively supported the private school while she worked at the public school and conceded on cross-examination that she was not totally dedi-

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[14]R. 210.

[15]*Id.* at 40.

[16]*Id.* at 64. Although Mr. Cook is now the headmaster at Calhoun Academy, his son still attends the private school. *Id.* at 80. Presumably, Mr. Cook has retained his impartiality.

[17]*Id.* at 42-43. Oddly enough, as Mrs. Adams was aware, the academy employed no speech therapist, while the public school system does have a speech therapist on its payroll. *Id.* at 48-51. The public school's speech therapist is black. *Id.* at 157.

[18]*Id.* at 91.

cated to a desegregated school system.[19] The conclusion of the court that "the dominant . . . reason why each plaintiff enrolled his or her children in Calhoun Academy was to avoid the desegregated public school system"[20] seems supported by substantial evidence.

The court began its analysis of the constitutionality of the regulation by recognizing the three objections which might cause the policy to founder: as a violation of the plaintiffs' first amendment rights of freedom of association; as an overbroad regulation impinging on protected first amendment values; and as an unreasonable classification violative of the due process and equal protection clauses.[21]

Conceding that the challenged policy implicated the plaintiffs' first amendment freedom of association, the court noted that constitutional rights may properly be curtailed when in conflict with a superior state interest.[22] After correctly indicating the applicability of a balancing formula in determining the relative priorities of competing interests,[23] the court made its first serious departure from established constitutional methodology. Relying on *Adler v. Board of Education*,[24] the court declared:

> It necessarily follows that if the board's policy is a *reasonable and constitutional* regulation, plaintiffs may not complain of the consequences of not being rehired as public school teachers for having exercised their rights to send their children to a private school.[25]

The court thus made clear that it considered the first amendment rights of the plaintiffs sufficiently frail to be overborne by a regulation having a rational relation to some legitimate educational goal. In adopting the relatively lax rational relation standard of the equal protection clause, the court ignored a consistent judicial determination to weigh competing interests in cases where the discharge of public employees is precipitated by their exercise of first amendment rights.[26] Indeed, after admit-

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[19]*Id.* at 97-99, 103.

[20]365 F. Supp. at 858.

[21]*Id.* The plaintiffs also raised a procedural due process question, claiming that they were not provided a hearing before the school board. Judge Keady dismissed the due process claim, stating that a hearing was not necessary since the plaintiffs had no expectancy of reemployment, and that in any event the trial of the case before the court constituted a sufficient hearing. Limitations of space and time prevent us from considering any procedural due process questions in this article.

[22]*Id.* at 859.

[23]*Id.*

[24]342 U.S. 485 (1952). As we will see, *Adler* can no longer be considered authority for anything; see text accompanying note 43 *infra*.

[25]365 F. Supp. at 859.

[26]*See, e.g.*, Pickering v. Board of Educ., 391 U.S. 563 (1968); Donahue v. Staunton, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); Moore v. Winfield City

ting the need to balance the interests of the plaintiffs in exercising their first amendment rights with the governmental interests served by the challenged policy, the court inexplicably failed to apply this analysis.

Having disposed of the first amendment question, the court focused on the argument that the regulation was facially overbroad "since it applies, literally, to all private schools of every description and regardless of particular circumstances that might motivate parental desire for private and not public, schooling."[27] Observing that the regulation had been applied only to teachers whose children attend racially discriminatory private schools and that, despite its wording, it was obviously intended only for them, the court again broke with constitutional precedent. Overbreadth presents no problem in this case, the court held, because as to the present plaintiffs' actions the policy is not overbroad. Since the activities of these plaintiffs do not fall within that class of expressive activity which could not be prohibited by even a narrowly drawn regulation, the plaintiffs were held to lack standing to challenge the policy on overbreadth grounds.[28] Thus, the chilling effect which traditionally has justified invalidation of overbroad infringements on first amendment values without regard to the constitutionality of a particular party's activities was discounted.[29]

Finally, the court addressed the plaintiffs' equal protection claim, applying the rational relation standard of review.[30] Validation of a regulation under the rational relation test requires only that some plausible circumstances be conceived that would relate the policy to some permissible state objective.[31] The court had no trouble postulating a supportive set of facts. In discussing them, the court approached the weighing-of-interests analysis which would have been appropriate in resolving the plaintiffs' first amendment claims.

Legitimate state interests were said to exist in preventing white flight from the public schools and in ensuring the loyalty of public schoolteachers to public education. Both interests could be said to be served by the challenged policy. Of most significance to the court was evidence showing that the policy was related to teacher effectiveness.

Bd. of Educ., 452 F.2d 726 (5th Cir. 1971); Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970); Pred v. Board of Pub. Instruction, 415 F.2d 851 (5th Cir. 1969).

[27]365 F. Supp. at 859.

[28]*Id.* at 859-60.

[29]*See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500, 515-17 (1964); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845-53 (1970); text accompanying note 142 *infra*.

[30]365 F. Supp. at 860.

[31]Schilb v. Kuebel, 404 U.S. 357, 364 (1971); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522,528 (1959).

Minority students might well perceive the actions of their teachers in enrolling children in a racially discriminatory private institution as acts of racially motivated rejection, and therefore "perform at a lower educational level."[32] For this final justification, the court extracted dicta from an earlier United States Supreme Court opinion:

> [U]nder *Brown v. Board of Education* . . . discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education.[33]

The court concluded that:

> [P]ublic school teachers who send their own children to a segregated school manifest a belief that segregation is desirable in education and a distrust in desegregated schools. Actions speak louder than words, to students no less than to adults. We hold that the board's policy, when limited to racially discriminatory private schools, is a permissible regulation, adopted in keeping with the command of the Fourteenth Amendment and the desegregation order of this court to eliminate racial discrimination and remove its pervasive influence from the county's public schools.[34]

The precise meaning of this last statement is unclear, but important. The court seems to say that the plaintiffs' actions might reasonably be perceived by minority students as motivated by racial bias and that such a perception would adversely affect their learning. This language could mean, however, that the actions of the plaintiffs in enrolling their children in an institution associated with racial discrimination is proof of the teachers' individual racial bias, and that racial prejudice is reason enough for their discharge, even in the absence of adverse perceptions by minority students.

Although the court's opinion might puzzle constitutional lawyers, its meaning was plain enough to teachers Cook, Adams, and Wright. They remained discharged; the school board's policy was upheld.

I. An Overview

Cook v. Hudson poses serious problems in the reconciliation of conflicts between the first amendment rights of public teachers and the educational and desegregational interests of the state. Yet the proper

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[32]365 F. Supp. at 860.

[33]*Id. quoting* Norwood v. Harrison, 413 U.S. 455, 469 (1973) (dicta).

[34]365 F. Supp. at 860.

decision on the facts of the case may be made with relative ease. The school policy under which the plaintiffs in this instance were discharged is, as we shall see, facially and unconstitutionally overbroad. The policy must be invalidated and the plaintiffs reinstated. It would be simplistic, though, to look at this case as no more than an exercise in the application of the first amendment overbreadth doctrine; our interest is piqued by the more central problem the school board was groping to reach, that of the teacher who, although instructing blacks and whites in a desegregated environment, takes care to enroll his own child in a securely white climate. We are concerned with the possible effects of such an action on the functioning of the school. More fundamentally, we are interested in discovering the proper methodological approach to be taken when public schoolteachers are penalized for the exercise of first amendment rights. The case law is unclear concerning adoption of a consitutional analysis when teacher first amendment rights are juxtaposed against state interests endangered by that expressive activity. We shall consider these questions and advance some tentative answers toward their resolution, with a view to defining when, if ever, the potential threats such teachers pose to the primary goals of the educational process may justify removal from their positions of influence. Since the essence of the problem we face is a determination of the superior of competing interests, we shall begin by describing those interests and their constitutional context as precisely as we can, outlining the constitutional status of public schoolteachers, the rights they are asserting, and the countervailing interests of the state in prohibiting the enrollment of children of public schoolteachers in racially discriminatory private schools. After pausing to understand why the policy adopted by the school board in *Cook v. Hudson* is inappropriate to the problem it attempts to solve, we will fashion an appropriate analytical vehicle for the reconciliation of those competing interests as they appear in varying factual contexts. Finally, through the use of our construct, we will examine the problems created by public schoolteachers who, for unknown motives, transfer their children to a racially discriminatory private school.

We find it unnecessary to consider the protections from arbitrary and capricious dismissal afforded public schoolteachers by the equal protection and due process clauses, not because they are inapplicable, but because even where applicable, they are subsumed by the greater safeguards of the first amendment. If the shield of the first amendment is found to be inadequate at any point in our inquiry, the more general restrictions of the 14th will be equally impotent. It will be apparent, however, that the rationality demanded of government action by the 14th amendment has an important role in our approach.

II. The Competing Interests

A. *The Plaintiffs' Interests*

1. The Constitution and the Public Employee

All discussions of the constitutional rights of public employees ensure their legitimacy by beginning with Holmes in *McAuliffe v. Mayor of New Bedford*.[35] We respect this tradition. Too, Holmes' unyielding statement that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"[36] directed judicial notions on the subject for two generations. The Holmes formulation characterized public employment as a privilege and placed public employees outside the pale of constitutional protection.[37] This concept of public employment as a privilege, with its concomitant denigration of the constitutional rights of those in the public employ, persisted through fully half of this century.[38]

Adler v. Board of Education,[39] on which the court in *Cook* relied, is grounded on the privilege assumption. *Adler* upheld New York's infamous Feinberg law, which barred members of "subversive" groups from public teaching. In almost a paraphrase of Holmes, the Court stated that public employees may have first amendment rights, but have no right to work in the public school system on their own terms. Public employees remained without significant constitutional protection.[40]

Indications of a change in constitutional policy began emanating from the Court almost immediately after *Adler*;[41] the Court entered the modern era of constitutional protection for the public servant in *Keyishian v. Board of Regents*[42]—a case that remains the definitive

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[35]155 Mass. 216, 29 N.E. 517 (1892).

[36]29 N.E. at 517.

[37]Grossman, *Public Employment and Free Speech: Can They be Reconciled?*, 24 AD. L. REV. 109 (1972); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); 4 LOYOLA U. OF CHI. L.J. 459, 460 (1973).

[38]*See, e.g.*, Garner v. Board of Pub. Works, 341 U.S. 716 (1951); United Pub. Workers v. Mitchell, 330 U.S. 75, 96-99 (1947); Bailey v. Richardson, 182 F.2d 46 (D.D.C. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951).

[39]342 U.S. 485 (1952).

[40]*Id.* at 492-93.

[41]Most notably, Shelton v. Tucker, 364 U.S. 479 (1960), and Wieman v. Updegraff, 344 U.S. 183 (1952). In striking down an Oklahoma statute prescribing loyalty oaths for state employees, *Wieman* gave us the first hopeful language that some form of constitutional protection does accompany the citizen into public employ:

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

Id. at 192.

[42]385 U.S. 589 (1967).

statement on admitting public employees to full constitutional protections. In *Keyishian*, the Court squarely addressed the premise of *Adler*—that "public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action"— and rejected it.[43] Subsequently, in *Perry v. Sinderman*,[44] the Court elucidated the constitutional status of the public employee.

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes upon his constitutionally protected interests—especially, his interest in freedom of speech.[45]

Today, although it is well settled that public employees retain their constitutional freedoms,[46] public employment itself still is not considered a constitutional right.[47] This qualification sounds more important than it is, for when the cases say there is no constitutional right to public employment, they mean only that public employees must observe reasonable conditions of employment established by governmental authorities.[48] The concept of public employment as a privilege which may be denied or terminated for even arbitrary reasons at the will of the employer is no longer a viable principle in determining the scope of the constitutional rights of public employees.[49]

The present consitutional status of public schoolteachers can now be briefly summarized. The academic tradition of tenure is irrelevant to the determination of the constitutional rights of public employees. Tenured and untenured teachers receive equivalent protections.[50] A teacher has no constitutionally protected right to continue to teach. He may be discharged for many reasons, but the discretion of the school authorities is limited by the substantive rights given the teacher by the Constitution. He may not be deprived of a position for a constitutionally impermissible reason. This is not to say that no teacher may be dis-

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[43]*Id.* at 605.

[44]408 U.S. 593 (1972).

[45]*Id.* at 597.

[46]Grossman, *supra* note 37, at 110-11.

[47]Pickering v. Board of Educ., 391 U.S. 563 (1968); Shelton v. Tucker, 364 U.S. 479 (1960); Wieman v. Updegraff, 344 U.S. 183 (1952); *see* Kutner, *The Freedom of Academic Freedom: A Legal Dilemma*, 48 CHI-KENT L. REV. 168, 174 (1971).

[48]Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 845.

[49]Slochower v. Board of Higher Educ., 350 U.S. 551, 555 (1956); Grossman, *supra* note 37; *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1079-82 (1968).

[50]Parducci v. Rutland, 316 F. Supp. 352, 354 (M.D. Ala. 1970).

charged for speaking or associating too freely; he demonstrably may be so discharged. Restrictions on the rights of public employees are still proper, but are now justified not by the absence of any rights of the employee, but by the interests of the state in the performance of essential and proper functions.[51] In any case, traditional constitutional balancing doctrines, the weighing of interests so common in constitutional adjudications, are to be applied in public employment cases, just as in cases involving other citizens. Whether those constitutional protections run to the activities at issue in *Cook* remains to be seen.

2. The Freedom of Association

Freedom of association has been recognized as being among the fundamental liberties protected by the first amendment at least since *NAACP v. Alabama*[52] was decided in 1958. Associational freedoms are guarded from infringement by indirect governmental pressures as well as by directly inhibitory state actions.[53] The most complete judicial expression of the scope of the freedom of association is found in *Griswold v. Connecticut*:[54]

> [I]t includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

Griswold denoted freedom of association as a "peripheral First Amendment right" within the "penumbra" of the first amendment, without which the express guarantees of the first amendment would remain unfulfilled. What this language means analytically is anyone's guess, but the cases are convincing that the guarantees of the first amendment extend fully to associational activities.[55]

The plaintiffs in *Cook* contended that their freedoms of association include their right to enroll their children in the school system of their choice, and that the plaintiffs' status as public schoolteachers does not

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[51] *See* text accompanying note 153 *infra*.

[52] 357 U.S. 449 (1958); *see* Annot., 33 L. Ed. 2d 865 (1973). *See also* Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964).

[53] *See* NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479, 485-90 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449, 461 (1958).

[54] 381 U.S. 479, 483 (1965).

[55] *See, e.g.*, Healy v. James, 408 U.S. 169, 181 (1972); Cole v. Richardson, 405 U.S. 676, 680 (1972); Louisiana *ex. rel.* Gremillion v. NAACP, 366 U.S. 293 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960).

affect this right. The first part of their claim is supported by a lineage of cases even older than recognition of the associational rights of which they are an expression. For almost 50 years, *Pierce v. Society of Sisters*[56] has supported the rights of parents to direct the education of their children. In *Pierce*, Oregon law required all normal children between the ages of 8 and 16 to attend the public schools. In challenging the statute, the Society of Sisters raised two principal arguments; one, that the statute was a taking of property without due process, need not concern us here. Second, the petitioners claimed that parents retain the right to direct the education of their children as they see fit. The Supreme Court recognized that the state has a legitimate interest in regulating education which might justify a compulsory education law. The state may safeguard the education of its citizenry by regulating, inspecting, and certifying the schools within its borders, by prescribing a certain minimum curriculum and minimum standards, and by requiring that minors attend only schools that have met these educational requirements.[57] At the same time, however, the Court held that the state interest does not extend to orthodoxy in education. Parents have a legitimate interest in guiding the education of their children, within the bounds prescribed by the state.

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[58]

The holding in *Pierce* was specifically reaffirmed in 1972 in *Wisconsin v. Yoder*.[59] In *Yoder*, Wisconsin's compulsory education law required parents to send their children to school until they reached age 16. The defendants, representatives of the Amish community, refused to continue their children's formal education past the eighth grade, basing their refusal on the free exercise of religion clause of the first amendment. The Court again conceded the strong state interest in regulating basic education, but stated flatly:

> Yet even this paramount responsibility was, in *Pierce*, made to yield to the right of parents to provide an equivalent education in a privately operated system. . . . As that case suggests, the values of parental direction of the religious upbringing and education of their children in

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[56]268 U.S. 510 (1925).
[57]*Id.* at 534.
[58]*Id.* at 535.
[59]406 U.S. 205 (1972).

their early and formative years have a high place in our society.[60]

Pierce and *Yoder*, therefore, recognize a right in the parents of school-age children to control their educational destiny; a right which, at least in the context of *Pierce* and *Yoder*, is superior to the interest of the state in overseeing basic education.

3. The Constitutional Status of the Plaintiffs in *Cook v. Hudson*

The rights of the plaintiffs in *Cook*, if traced through *Pierce* and *Yoder*, seem strongly protected. However, this is not *Pierce* or *Yoder*; indeed, the circumstances present here make this a very different case, one that receives only diluted support from those two decisions. First, *Pierce* and *Yoder* arose in the context of first amendment claims bottomed in the free exercise of religion clause. Particularly in *Yoder*, the special importance of the free exercise clause was relied upon as the almost exclusive justification for upholding the claims of the Amish.[61] Although in *Pierce* one of the party defendants challenging the constitutionality of the Oregon statute was a private military academy, parochial interests also played an important part in that case. Indeed, *Yoder* suggests that the significance of *Pierce* may be limited to situations in which the religious beliefs of the parents motivate their actions.[62] In allowing the religious interests of the Amish to prevail over the state's educational ones, the Court further suggests that its holding should be limited to the *Yoder* facts, stating that in the "generality of cases" the state's interests in education will be dominant over the contravening secular interests asserted by parents.[63] On the other hand, the Court in *Norwood v. Harrison*[64] secularizes the rights recognized in *Pierce*, reading the case to say "that a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice."[65] Thus, while we have some indication that the rights of parents to control the educational destiny of their children may be dependent, at least in part, on the presence of a religious motive, we must conclude that even the complete absence of a religious claim will not, of itself, abrogate the constitutional validity of the parents' rights.

More importantly, in both *Pierce* and *Yoder* the first amendment activities of the challenging parties were viewed with favor by the Court. In *Pierce*, the beneficial effects of parochial and military education and

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[60]*Id.* at 213-14.
[61]*Id.* at 215-16.
[62]*See id.* at 231-34.
[63]*Id.* at 221.
[64]413 U.S. 455 (1973).
[65]*Id.* at 461.

the sound public service provided by private schools were stressed as important bases for the decision. The private schools were "engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the State."[66] In *Yoder*, the industry and thrift of the Amish provided a substantial portion of the justification for carving out an exception to Wisconsin's compulsory education law.[67] In each case, the restricted activity was perceived by the Court to contribute to the well-being of society. Each activity enjoyed a favored status.

In *Cook*, religious claims do not occupy a central place.[68] Indeed, the associational freedom here advanced is essentially racial: the freedom to attend an all-white academy. At the risk of understatement, it may be confidently said that the judiciary no longer views discriminatory education as socially positive. It is difficult to recall any activity which has incurred more sustained disfavor in judicial eyes than has segregated education. Further, there are indications that the courts are ready to consider the constitutional disutility of racial discrimination in weighing first amendment claims. In two important recent cases,[69] freedom of association exercised for the purposes of racial discrimination has been spoken of, if not treated, unfavorably. Each opinion indicated that racially discriminatory association stands on a lower constitutional plateau than does associational activity under the free exercise clause.

In *Green v. Connally*,[70] the tax exempt status of racially discriminatory private schools was under consideration. Responding to the argument that indirect economic benefits such as tax exemptions had been judicially approved for religious educational institutions, the court said: "But the governmental and constitutional interest of avoiding racial discrimination in educational institutions embraces the interest of avoiding even the 'indirect economic benefit' of a tax exemption."[71] Thus the *Green* court served notice that first amendment freedom of religion enjoys greater protection than does the right to associate in a racially discriminatory manner.

The point suggested by *Green* was raised more firmly by the Su-

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[66]268 U.S. at 534.

[67]406 U.S. at 221-29.

[68]The plaintiffs did claim that religious instruction at the private school was a factor in their decisions. The trial court found, however, that the plaintiffs acted out of racial, not religious motives. *See* 365 F. Supp. at 858.

[69]Norwood v. Harrison, 413 U.S. 455 (1973); Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) (mem.).

[70]330 F. Supp. 1150 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971)(mem.).

[71]*Id.* at 1169.

preme Court in *Norwood v. Harrison*.[72] At issue in *Norwood* was a Mississippi statute[73] providing for state issuance of textbooks to students in both public and private schools, without regard to the racial policies of the private schools. In finding that the Mississippi textbook law impermissibly aided a discriminatory practice, the Court compared the associational values inherent in the free exercise clause with the freedom of association claims that protect private racial bias:

> [A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, *but it has never been afforded affirmative constitutional protections.*[74]

The Court held that a greater degree of state aid is permissible to nondiscriminatory parochial schools than to racially discriminatory private schools.[75]

In the present case there is no significant parochial interest. On balance, all-white private schools do not have a positive social value; the attitudes upon which such institutions are based fly in the face of a full century of congressional and constitutional expression. From *Norwood v. Harrison* it is clear that associational values based on racial discrimination are manifestly disfavored in the constitutional design.[76] This does not establish that no right whatever exists for parents to enroll their children in racist academies.[77] It does establish, however, that this right occupies a subordinate position to that upheld in *Yoder* and *Pierce*, and that in any comparison of competing interests, the associational rights of parents to enroll their children in a racially discriminatory school may be adjusted accordingly by the courts.[78]

Two further distinctions between *Pierce* and *Yoder* and the present case may help to define more precisely the nature of the plaintiffs' interests. First, in both *Pierce* and *Yoder* the rights of parents to choose the mode of education for their children was weighed against the interest of the state in providing education for its citizens. In *Cook*, one competing state interest is the elimination of the effects of a segregated school

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[72]413 U.S. 455 (1973).

[73]MISS. CODE ANN. §§ 6634 *et seq.* (1942).

[74]413 U.S. at 469-70 (emphasis added).

[75]*Id.* at 470.

[76]*Id.* at 469-70.

[77]*But see* Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973) (holding that blacks have a statutory contractual right under 42 U.S.C. § 1981 (1971) to attend any private school).

[78]*See also* Augustus v. School Bd., 361 F. Supp. 383, 389 (N.D. Fla. 1973) (banning Confederate paraphernalia from a desegregated public school).

system. While it may be difficult to conceptualize the governmental interest in equal education being stronger than its interest in providing education at all, that is the case. There exists no constitutional imperative for a state to educate its citizens, as *San Antonio Independent School District v. Rodriguez*[79] makes clear. Mississippi, for example, has chosen not to enact a compulsory education law, and there is no suggestion that the state is constitutionally required to do so. On the other hand, the experience of the 20 years since *Brown v. Board of Education*[80] gives ample proof that equal and nondiscriminatory education enjoys a constitutional priority. In any case, the interjection into the equation of this novel interest demands a reevaluation of the balance which must be struck.

Second, in an aside which seems tailored for *Cook* and similar situations, the Court in *Pierce* qualified its opinion by noting that, although the right of parents to choose the educational vehicle for their children was upheld there, "there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education."[81] *Pierce*, of course, was decided during the reign of *Plessy v. Ferguson*,[82] almost 30 years before *Brown I*. The Court could not have foreseen the constitutional and societal emphasis on nondiscriminatory education, nor the extraordinary measures which would be required to achieve it in the face of massive white resistance. No doubt the elimination of a dual school system, if that elimination necessitates a restriction of plaintiffs' associational rights, constitutes sufficiently extraordinary circumstances to bring the *Cook* decision within the qualification expressed in *Pierce*.

In attempting to identify the nature and extent of the interests possessed by public schoolteachers in retaining both their jobs and their children's enrollment in a racially discriminatory private school, we conclude that the associational rights claimed by the plaintiffs are protected by the first amendment. We have also seen that these interests may be accorded less weight by the courts when juxtaposed against the conflicting state interests to which we now turn.

B. The State's Interests

The court's opinion in *Cook* is vague concerning the interest of the state. Is it equal educational opportunity, education itself, the elimination of racial discrimination, or simply desegregation? The court posits all of these goals as sufficient justifications for the school board's pol-

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[79]411 U.S. 1 (1973).
[80]347 U.S. 483 (1954).
[81]268 U.S. at 534.
[82]163 U.S. 537 (1896).

icy.[83] The two primary bases of the policy, however, are education and elimination of racial discrimination. The societal aims of the policy are more varied: removal of the inferiority complex inherently produced by segregation;[84] lowering of social barriers;[85] heightening of educational achievement for minorities;[86] affording direct evidence of equal treatment and facilities to blacks;[87] and facilitation of the entry of blacks into the "mainstream of American life."[88] From these various components emerges the ultimate goal of desegregation in education: elimination of race as a classifying factor from all aspects of society.[89]

> From a broader perspective, it is the height of irony and hypocrisy to teach representative democracy while depriving the very institution in

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[83]Judge Keady also justified the policy on the basis that it "strengthen[ed] local support for the public schools by requiring its teachers to give their undivided loyalty to the unitary school system . . . ." 365 F. Supp. at 860. Such a nurturing of local support at the cost of first amendment rights is of questionable constitutionality. *See Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1066 (1968). Such a justification was probably proffered merely as a condition for "effective desegregation."

[84]Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement*, 37 MINN. L. REV. 427, 433 (1953) (Brief for Appellants, Appendix, Brown v. Board of Educ., 347 U.S. 483 (1954)).

[85]Desegregated Negroes are more rejecting of the color line and more accepting of both white and Negro people. Segregated Negroes, on the other hand, tend to live within the color line and are less accepting of whites.

M. WEINBERG, DESEGREGATION RESEARCH: AN APPRAISAL 122 (2d ed. 1970); *see* G. ALLPORT, THE NATURE OF PREJUDICE 219-20 (Anchor Books ed. 1958); M. ROKEACH, THE OPEN AND CLOSED MIND 161-64 (1960); UNITED STATES COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS, U.S.A. PUBLIC SCHOOLS SOUTHERN STATES 30-31 (1962).

[86]*See, e.g.*, UNITED STATES COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 203-04 (1967). *But see* COLEMAN REPORT, OFFICE OF EDUC., UNITED STATES DEPT. OF HEALTH, EDUC. & WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966) [hereinafter cited as COLEMAN REPORT]:

> [S]chools bring little influence to bear on a child's achievement that is independent of his background and general social context; and . . . this very lack of an independent effect means that the inequalities imposed on children by their home, neighborhood, and peer environment are carried along to become the inequalities with which they confront adult life at the end of school. For equality of educational opportunity through the schools must imply a strong effect of schools that is independent of the child's immediate social environment and that strong independent effect is not present in American schools.

Id. 325.

[87]Campbell, *Defining and Attaining Equal Educational Opportunity in a Pluralistic Society*, 26 VAND. L. REV. 461, 477-78 (1973).

[88]United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 389 (5th Cir.)(per curiam), *cert. denied*, 389 U.S. 840 (1967); *accord*, Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964).

[89]The effort to eliminate discrimination has, of course, been extended far beyond the schoolyard. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964) (food service); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (hotel accomodations); New Orleans v. Barthe, 376 U.S. 189 (1964) (per curiam) (public parks); Johnson v. Virginia, 373 U.S. 61 (1963) (per curiam) (seating in courtrooms); Boynton v. Virginia, 364 U.S.

> which it is being taught that noble means of governance. If there is a division between the governed and those who govern, then the governers become the enemy—the system—and the people learn hatred, not respect, vengence not loyalty.[90]

Education and the closely identifiable goal of equal educational opportunity[91] are frequently cited as primary aims of desegregation in the schools. The lowered achievement level produced by racial separation has frequently been noted,[92] and the importance to our society of eliminating that educational disparity is obvious. Indeed, in *Brown v. Board of Education*[93] the Supreme Court stated:

> Today, education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[94]

How high a rung on the ladder of constitutional priorities does the state's interest in education occupy? The answer is not clear. In *Wisconsin v. Yoder*[95] there is an indication that the interest, while sub-

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454 (1960) (bus terminals); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (golf courses); Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (beaches); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964) (private hospital); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (per curiam) (prison facilities).

[90]Smalls, *The Path and the Promised Land: School Desegregation*, 21 AM. U.L. REV. 636, 653 (1972). "Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education and is wasteful of manpower and talent, whether this situation occurs by law or by fact." Statement by the Board of Regents of the University of the State of New York, Jan. 27-28, 1960, *quoted in* Blocker v. Board of Educ., 226 F. Supp. 208, 229 (E.D.N.Y. 1964).

[91]The constitutional distinction between education and equality of educational opportunity is that, whereas the purpose is the same, education is not a constitutional guarantee while equal educational opportunity is grounded in the 14th amendment.

[92]Brown v. Board of Educ., 347 U.S. 483, 493 (1954); *see* COLEMAN REPORT 307-10.

[93]347 U.S. 483 (1954).

[94]*Id.* at 493; *see* United States v. Jefferson County Bd. of Educ., 380 F.2d 385, 390 (5th Cir.) (per curiam), *cert. denied*, 389 U.S. 840 (1967); Barksdale v. Springfield School Comm., 237 F. Supp. 543, 546 (D. Mass.), *vacated*, 348 F.2d 261 (1st Cir. 1965). For a discussion of equality of educational opportunity as the aim of desegregation, see San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969) (per curiam). *See also* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968). *But see* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

[95]406 U.S. 205 (1972); *see* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

stantial, is not overwhelming. As previously discussed, *Yoder* established that although there is a high degree of importance to the state in providing an education for its citizens, this interest is limited. While noting that "[p]roviding public schools ranks at the very apex of the function of a State,"[96] the Supreme Court held:

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests. . . . [H]owever strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.[97]

From this language one might be tempted to lower the interest in education from its summit to a more medial level. The Court states in *Yoder*, however, that in the "generality of cases" the state's interest will outweigh other interests.[98] Thus the lowering of the state's interest in education cannot justifiably be carried beyond factual situations closely akin to that in *Yoder*.

In light of *Yoder*, it is asserted that the state's interest in education is largely predominant. The importance to a state of the effective education of its youth cannot be overemphasized. As has been noted,[99] the education of youth prepares them to become effective members of society. Surely if we are to continue to place trust in the abilities of individual members of society, we must assure that they are responsible, knowledgeable citizens, aware of their duties in a democratic society. Such assurance may be given only through the effective education of the youth of a state, thereby instilling in them an awareness of and a belief in the values of a democracy.

Thus it appears that once a state grants its citizens the privilege of public education,[100] the importance to a state of *proper* education dictates that, when juxtaposed against interests of an individual, the state's interest in education will weigh heavily. As was noted by the United States Fifth Circuit Court of Appeals in *Burnside v. Byars*:[101]

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[96]406 U.S. at 213.

[97]*Id.* at 214-15.

[98]*Id.* at 221.

[99]*See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 70, 110-17 (1973) (Marshall, J., dissenting); R. HESS & J. TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN 120-32 (Anchor Books ed. 1968).

> If the children are brought up in common [in our schools] in the bosom of equality, if they are imbued with the laws of the state and the precepts of the general will, . . . we cannot doubt that they will cherish one another mutually as brothers, . . . to become in time defenders and fathers of the country of which they will have been the children.

J. ROUSSEAU, SOCIAL CONTRACT 269 (Simon & Schuster ed. 1938).

[100]*See* text accompanying note 79 *supra*.

[101]363 F.2d 744, 748 (5th Cir. 1966).

> [T]he liberty of expression guaranteed by the First Amendment can be abridged by state officials if their protection of legitimate state interests necessitates an invasion of free speech. . . . The interest of the state in maintaining an educational system is a compelling one, giving rise to a balancing of First Amendment rights with the duty of the state to further and protect the public school system.

To what extent may a state act in eliminating the harmful effects produced by discriminatory educational practices? Upon recognizing the numerous attendant evils of such discrimination, one may correctly assume that the state may go far to achieve this end.

> Those protesting against school imbalance realize the impossibility of constructing a precise causal connection between the imbalanced schools and the evils that generally plague the Negro living in a ghetto. But they do insist that a possible response to insult and stigma is a lessening of motivation, alienation of the child from the educational institution, distortion of personal relationships, and various forms of antisocial behavior.[102]

Courts have frequently described their plenary power to remove the pervasive effects of discrimination. In *Green v. County School Board*,[103] the Supreme Court stated that, in the conversion from a segregated to a unitary school system, the state had "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[104] Similarly, in *Green v. Connally*,[105] the district court stated:

> There is a compelling as well as a reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War. That government interest is dominant over other constitutional interests to the extent that there is complete and unavoidable conflict.[106]

Such language as this is consistently used by the courts, indicating that the power to eliminate discrimination is absolute, and that once discrimination is found all countervailing interests must yield, no matter how nominal the discriminatory effect or strong the opposing interests. We feel, however, that there is a valid basis for distinguishing

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[102]Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 569 (1965).

[103]391 U.S. 430 (1968).

[104]*Id.* at 437-38.

[105]330 F. Supp. 1150 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971)(mem.).

[106]330 F. Supp. at 1167 (footnotes omitted).

between cases such as *Green v. School Board* and *Cook v. Hudson*. *Green v. School Board* involved the conversion from a state-imposed dual school system to a unitary school system, and it was toward such situations that the broad language commanding elimination of discrimination "root and branch" was addressed. In *Cook*, of course, no similar context exists; instead of a basic conversion from segregation to desegregation, a peripheral instance of discrimination is present, one which is more aptly described as involving an interest of the state than an affirmative duty.

There is another reason not to apply here the absolute language of the *Green* cases. Although the Supreme Court stated 20 years ago that "[s]eparate educational facilities are inherently unequal,"[107] courts have balked at eliminating the discriminatory effects of such separate facilities when the separation is found to be de facto rather than de jure.[108] Such a refusal to eliminate de facto discrimination might be premised on the theory that the same discriminatory effects do not flow,[109] although a recent analysis of the available research stated that "[t]he legal distinction between *de facto* and *de jure* segregation has not been found to be of any consequence in studying the impact of segregation upon children."[110] The de jure and de facto line of cases and the above distinction between *Cook* and the *Green* cases lead to the conclusion that the state has an absolute duty to eradicate discrimination when that discrimination is a product of state action. In *Cook v. Hudson*, however, discrimination arises not from affirmative state action, but through the private action of a state employee. In other cases involving such instances of private discrimination in the school context, courts have allowed the elimination of the discrimination, but not without a consideration of the opposing interests of the individual. In *Augustus v. School Board*[111] white students were bringing confederate flags to school, thereby angering black students and creating a threat of possible violence. In banning the flags, the court noted the first amendment rights of the white students, but held those rights to be outweighed by the threatened violence. The court, in noting the adverse

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[107]Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

[108]*See, e.g.*, Board of Educ. v. Dowell, 375 F.2d 158 (10th Cir.), *cert. denied*. 387 U.S. 931 (1967); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); Bradley v. School Bd., 317 F.2d 429 (4th Cir. 1963); Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd*, 404 U.S. 1027 (1972) (mem.); Bell v. School City, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

[109]Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U.L. REV. 157, 174-75 (1963).

[110]M. WEINBERG, DESEGREGATION RESEARCH: AN APPRAISAL 2 (2d ed. 1970).

[111]361 F. Supp. 383 (N.D. Fla. 1973).

effects on the desegregated school system, stated: "While it is true that purely private discrimination is not actionable, private discrimination which impedes the maintenance of [a] unitary system can be subject to court regulation."[112]

Although the state has an absolute duty to eliminate that discrimination which it causes, that extirpative power is attenuated when the discrimination arises solely through the private actions of a public employee. In such cases, as in *Cook*, there must be a consideration of the competing interests of the employee, and the consideration must be more than the perfunctory recognition given the plaintiffs in *Cook*. The essential difference is not that an individual causes quantitatively less harm by his own discrimination than does the state, or that the authority of state action legitimates its discriminatory action, but that the constitutional rights of an individual are involved and require consideration. Indeed, the semantic distinction between "must" and "can" suggests the attenuating effects of private as opposed to state action: "Must," applied to state action, implies a compelled, unhindered requirement; "can" denotes a limitation and an appreciation of antithetical interests.[113] Nevertheless, there is no doubt that the ability of the state to remove discrimination and its harms from the public schools, even when occurring through private action, is far-reaching.

III. The Overbreadth Problem

Regardless of the legitimacy of a policy that would forbid teachers in the public schools to enroll their children in racially discriminatory private schools, the policy applied in *Cook v. Hudson* contains patent defects which render it objectionable under any standard of review. Although apparently promulgated with only the Calhoun Academy in mind,[114] this inartfully worded oral regulation prohibits public schoolteachers from sending their children to *any* private school for *any* reason. Further, there is every indication that the Calhoun County public school authorities would have dismissed all teachers who offended its literal wording.[115] Thus, a teacher with a child enrolled in a parochial school or an institution for the retarded would face dismissal, just as would a teacher who sent a child to a racially discriminatory school.

The obvious questions are evoked. Do these peculiarities render the regulation unacceptably overbroad?[116] If so, do the present complainants

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[112]*Id.* at 389.

[113]*See* Augustus v. School Bd., 361 F. Supp. 383 (N.D. Fla. 1973). *Compare* Blocker v. Board of Educ., 226 F. Supp. 208, 222-23 (E.D.N.Y. 1964) *with* Bell v. School City, 213 F. Supp. 819, 831 (N.D. Ind. 1963).

[114]*See* R. 210; R.2d 21-22.

[115]*See* R. 25-26, 40.

[116]*See generally* Note, *supra* note 29.

have standing to raise the overbreadth claim? Are there factors unique to school policy decisions which require a more lenient standard of review for overbreadth than is employed in other contexts? Finally, even if the overbreadth rubric is applicable here, do considerations of judicial economy militate against its use as the exclusive solution to the problem?

As we have seen, the right of parents to enroll their children in an educational system of their choice implicates first amendment values of freedom of association. Thus, by forcing parent-teachers to choose the public system, the challenged rule trenches on recognized constitutional rights. As an infringement on first amendment interests, the regulation must, even if otherwise justified by a sufficiently substantial governmental stake, disturb those interests to the minimum possible extent if the infirmity of overbreadth is to be avoided. A governmental regulatory or punitive enactment is unconstitutionally overbroad if it proscribes or inhibits, because too broadly drawn, both conduct which constitutionally may be deterred and conduct which is constitutionally protected from governmental interference. An enactment will be completely invalidated as overbroad only if the enactment is not susceptible to a judicial construction which can eliminate deterrence of protected activity. Even where a legitimate governmental interest is involved, that interest cannot be promoted in a manner which suppresses fundamental rights when the desired end can be reached by a less restrictive alternative.[117]

The overbreadth doctrine bars state action that penalizes both associations which constitutionally may be discouraged and those which may not.[118] The doctrine operates to preserve first amendment rights from the threat of penalties which may be a deterrent to their exercise almost as formidable as the application of the penalty itself.[119] As put succinctly by Judge Goldberg of the Fifth Circuit in *Hobbs v. Thompson*:[120]

> Even though the interests a statute promotes may justify some infringement upon First Amendment rights, the overbreadth doctrine condemns those means to that legitimate end which comprehend too broad an incursion upon the realm of First Amendment activity.

Overbreadth scrutiny obviates the need for a weighing of competing

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[117]*See* United States v. Robel, 389 U.S. 258, 268 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 602 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960); 6 IND. L. REV. 544, 549 (1973).

[118]*See* Aptheker v. Secretary of State, 378 U.S. 500 (1964); Alabama Educ. Ass'n v. Wallace, 362 F. Supp. 682, 687 (M.D. Ala. 1973); cases cited note 117 *supra*.

[119]Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973); NAACP v. Button, 371 U.S. 415, 432-33 (1963).

[120]448 F.2d 456, 460 (5th Cir. 1971).

interests; once government action is found to be impermissibly and incurably overbroad, it is totally invalidated.

The overbreadth doctrine is applied when three conditions arise: (1) the statute or regulation may be impermissibly applied in a manner that may deter protected activity; (2) that protected activity includes first amendment values; and (3) the statute or regulation is not susceptible of a rehabilitory construction that eliminates abridgment of protected first amendment values.[121]

The governmental interests in *Cook*— the elimination of racial discrimination in public education and the promotion of education generally—may be sufficient, in the context in which they are juxtaposed, to justify this infringement of the rights of the plaintiffs to enroll their children in Calhoun Academy.[122] The present school policy is unconstitutionally overbroad if, in achieving its presumably legitimate purposes, it also deters other protected first amendment activity not connected to the proper goals of the policy.

If a parent-teacher wished to send a retarded or otherwise handicapped child to a public or private nondiscriminatory institution for special treatment, no useful purpose related to the goals which justify the school policy would be served by requiring the child to be enrolled in the Calhoun County public schools, where little attention could be given to his special problems. It is also conceivable that a parent-teacher might wish to enroll a child in a desegregated private school, in a military academy, or in a parochial school for religious training. Again, no goals of the policy would be inhibited by such actions. In these and analogous cases, no adverse effects which might justify a prohibition on these activities may reasonably be anticipated. The reasons for which the policy was enacted and which are advanced as its justification sim-

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[121]*See* United States v. Dellinger, 472 F.2d 340, 357 (7th Cir. 1972).

While vagueness and overbreadth are definitionally distinguishable, in the arena of the first amendment courts have not attempted to draw functional distinctions between the two concepts. Since vague enactments threaten the same chilling effect on first amendment rights as do overbroad ones, courts have treated unconstitutionally vague laws as overbroad ones, applying the overbreadth tests and consequences to both. For instances in which courts have noted the lack of constitutional difference between the two types of defects, see Keyishian v. Board of Regents, 385 U.S. 589, 597-604 (1967); NAACP v. Button, 371 U.S. 415, 432-33 (1963) ("The objectionable quality of vagueness and overbreadth . . . depend[s] upon . . . the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."); United States v. Dellinger, 472 F.2d 340, 355 (7th Cir. 1972); Alabama Educ. Ass'n v. Wallace, 362 F. Supp. 682, 685-87 (M.D. Ala. 1973). It is true that a distinction has been drawn between the two doctrines for purposes of abstention. *See* Zwickler v. Koota, 389 U.S. 241 (1967).

[122]*See* Lee v. Macon County Bd. of Educ., 483 F.2d 242 (5th Cir. 1973); Augustus v. School Bd., 361 F. Supp. 383 (N.D. Fla. 1973); Green v. Connally, 330 F. Supp. 1150, 1167 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) (mem.).

ply do not apply to these actions. In short, these are constitutionally protected activities. Since all these possibilities are foreclosed by the challenged regulation, it is unconstitutionally overbroad. In pursuance of a legitimate object, the policy prohibits the exercise of protected as well as unprotected first amendment activity and is, on its face, too definite to admit of a rehabilitory construction.[123] Further, there demonstrably does exist a less offensive alternative for achieving the school board's goals. The purposes of the policy could be achieved, for example, by a regulation which would read as follows:

> No teacher in the Calhoun County public school system may enroll his or her child in any private school, academy, or educational institution that discriminates on the basis of race in its hiring or admission policies. Any teacher in violation of this regulation will not be employed in the Calhoun County public school system or, if employed, will not be reemployed.

Even though the board's policy is unconstitutional owing to its overbreadth, may the present plaintiffs avail themselves of that defect? When first amendment rights are at stake, traditional approaches grant litigants standing to challenge government enactments on overbreadth grounds, without any requirement that the party challenging the constitutionality of the statute demonstrate that his own activities cannot constitutionally be delimited.[124] Courts do not limit their overbreadth inquiry to a simple determination of whether the infringement on first amendment values is unconstitutional in the present case; rather, they scrutinize the statute for facial overbreadth.[125] In short, any party has standing, under the usual view, to challenge a statute which regulates in the first amendment area and, if incurable overbreadth is found, the courts will invalidate the scheme in its entirety as facially unconstitutional. A party whose activities might constitutionally be restricted is thus allowed to benefit when the statute that affects him is overbroad.[126]

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[123]It is difficult to determine whether the district court construed the regulation to apply to Calhoun Academy only, or whether the court was reviewing the policy only as applied in the case before it. 365 F. Supp. at 859-60. The first alternative, while it would eliminate this problem of overbreadth, is a strained interpretation not supported either by the language of the policy or the testimony. The second possible interpretation of the court's opinion is equally undesirable, for it simply mistakes the applicable law.

[124]Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 168 (1972); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); Aptheker v. Secretary of State, 378 U.S. 492, 515-17 (1964); Thornhill v. Alabama, 310 U.S. 88, 98 (1940); United States v. Dellinger, 472 F.2d 340, 356 (7th Cir. 1972); Hobbs v. Thompson, 448 F.2d 456, 459-60 (5th Cir. 1971).

[125]NAACP v. Button, 371 U.S. 415, 432-33 (1963).

[126]*See* Dombrowski v. Pfister, 380 U.S. 479, 491 (1965); United States v. Delinger, 472 F.2d 340, 356 (7th Cir. 1972); Note, *supra* note 29, at 847.

In *Broadrick v. Oklahoma*,[127] the Supreme Court has recently cast doubt on these well-established principles of standing in first amendment overbreadth cases. In a 5 to 4 decision, the Court upheld an Oklahoma law which it assumed to impinge overbroadly on first amendment freedoms. Although the majority opinion is unclear, the Court appeared to hold that facial overbreadth scrutiny—overbreadth review without regard to the constitutional status of a particular litigant's activities—is appropriate only where the challenged statute is "substantially" overbroad. The Court also indicated that where the protected activity endangered was not "pure speech," but was conduct protected by the first amendment, a more "substantial" overbreadth must exist before facial overbreadth treatment is merited.[128]

We believe the Court may intend to inject a test of proportionality into the first amendment overbreadth doctrine, allowing facial overbreadth adjudication where the deterred but protected activity is qualitatively and quantitatively substantial in relation to the activity legitimately proscribed, but requiring the statute to be overbroad as applied where a proportionately small amount of activity is unconstitutionally deterred. *Broadrick* does indicate that at least some future parties may be forced to show that their expressive activities cannot constitutionally be proscribed before they are allowed an overbreadth review.

Whatever the future of this novel approach to first amendment overbreadth, it has no place here. The challenged policy in *Cook* prohibits a proportionately substantial amount of protected first amendment activity in relation to the activity it legitimately proscribes. The number of applications as to which the policy is overbroad far outweighs, both qualitatively and quantitatively, its sole arguably constitutional application to racially discriminatory private schools.

There are other recent indications that the traditional approach may not be followed when the enactment undergoing overbreadth scrutiny is not a penal statute but a school regulation. Although the deference shown to school authorities by the courts in matters of educational policy has evaporated considerably in recent years, at least when those policies affect constitutional rights,[129] there remains a substantial residue of at least verbal respect accorded the expertise of local school boards.[130] Two recent cases involving overbroad or vague school regulations, *Eisner v. Stamford Board of Education*[131] and *Murray v. West*

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[127]413 U.S. 602 (1973).

[128]*Id.* at 615-16.

[129]James v. Board of Educ., 461 F.2d 566, 575 (2d Cir. 1972); Van Alstyne, *supra* note 48, at 845-46.

[130]*See* Schultz v. Palmberg, 317 F. Supp. 659 (D. Wyo. 1970).

[131]440 F.2d 803 (2d Cir. 1971).

Baton Rouge Parish School Board,[132] suggest that deferential treatment is still to be accorded school board policies.

In *Eisner*, the school had adopted a regulation which banned the distribution of any material that would interfere with the orderly operation of the school, or cause disruption.[133] The court noted that the regulation did not require the putative disruption to be substantial,[134] as demanded by *Tinker v. Des Moines Independent School District*.[135] Logically, under the court's analysis, the regulation proscribed activity which could not constitutionally be burdened, and was, therefore, overbroad. Rather than apply the broad standard of overbreadth review that we have come to expect in the first amendment area, though, the court said: "[W]e assume that the Board would never contemplate the futile as well as unconstitutional suppression of matter that would create only an *im*material disturbance."[136] Based on this assumption of the good faith of the school authorities, the court held the policy not to be overbroad.[137]

In *Murray*, the plaintiff was expelled from school under the terms of a disciplinary code which proscribed conduct such as "willful disobedience," "immoral or vicious practices," and "intentional disruption."[138] Although conceding that the regulations were imprecise, the court indicated that school disciplinary rules were not assumed to be drafted with the degree of precision expected of criminal codes:

> [S]ome degree of discretion must, of necessity, be left to public school officials to determine what forms of misbehavior should be sanctioned. Absent evidence that the broad wording in the statute is, *in fact*, being used to infringe on First Amendment rights, . . . we must assume that school officials are acting responsibly in applying the broad statutory command.[139]

Although the policies in *Murray* were under fire for vagueness as well as for overbreadth, we have seen that the two conditions are analytically indistinguishable in the first amendment setting,[140] and the language of

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[132]472 F.2d 438 (5th Cir. 1973).

[133]The policy stated, in part:

> No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.

440 F.2d at 805.

[134]*Id.* at 808.

[135]393 U.S. 503, 508-09 (1969).

[136]440 F.2d at 808.

[137]*Id.* at 808-09.

[138]472 F.2d at 441.

[139]*Id.* at 442 (emphasis added).

[140]*See* note 121 *supra*.

the court is plainly applicable to overbreadth scrutiny.

The deference to the expertise of school authorities which grounds both *Eisner* and *Murray* results in an assumption of constitutional application of rules that are facially overbroad. Such an assumption simply eliminates the broad overbreadth review that has characterized the doctrine in the first amendment area. Instead of voiding the entire regulation for all purposes "without regard to the constitutional status of the particular claimant,"[141] the *Murray* and *Eisner* courts adopted the more restrained procedure of reviewing the regulations only in the factual contexts in which they were presented. As in the *Broadrick* formulation, this forces the penalized parties to bring their activities within the class which could not be affected by a carefully drawn regulation. Under this approach, a party whose activities might constitutionally be restricted will not be allowed to challenge an overbroad school policy; or, if overbreadth is considered, scrutiny will be limited to a determination of whether the regulation is constitutional as applied.

If the standard of overbreadth review utilized in *Eisner* and *Murray* is applied to the *Cook* facts, it is clear that the plaintiffs will be unable to benefit from the overbreadth of the school board policy: Even if the policy has any constitutional application, the activities of these teachers in enrolling their children in an all-white, racially discriminatory academy to evade a desegregated education come within that class of activities which may constitutionally be prohibited.

We believe that the traditional strict review which the courts have accorded overbroad statutes in the first area is appropriate to this case. We would reject the attempt represented by *Eisner* and *Murray* to introduce a more lenient standard in cases where the policymaking body is presumed to have expertise, and where the prescribed sanction is something less than a prison sentence. The liberal application of overbreadth in first amendment cases arises from a judicial recognition of the especial significance of untrammeled exercise of free expression in a free society. The courts have correctly observed that the dangers of an overbroad statute in the first amendment context are those of intimidation in the exercise of protected rights which could not be limited by narrowly drawn restrictions. As the Court has noted: "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[142] Courts have great latitude to eliminate the deterrent effect of overbroad regulations on the exercise by others of constitutionally protected rights.[143] This potential chilling effect on the exercise of first amendment rights justifies the consequences of the scrutiny—declaring the entire statute void for all applications, thereby end-

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[141]Note, *supra* note 29, at 845.

[142]NAACP v. Button, 371 U.S. 415, 433 (1963).

[143]Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); Note, *supra* note 29, at 853.

ing its chilling effect.[144]

Cook v. Hudson falls within both the letter and the spirit of the theory of overbreadth review in first amendment cases. Parent-teachers who might wish to enroll their children in nondiscriminatory private institutions for religious or special educational purposes are effectively inhibited from exercising their first amendment rights so long as this policy remains in force. That the threat to citizens is the loss of their jobs rather than incarceration seems to us constitutionally insignificant; either is of sufficient consequence to produce the chilling effect. It is the deterrent effect on first amendment exercise, not an arbitrary criminal/noncriminal distinction, which justifies facial overbreadth scrutiny. Therefore, we conclude that the school board's policy is unconstitutionally overbroad, that the present plaintiffs may utilize the overbreadth doctrine, and that the entire policy should be invalidated for all purposes.

Overbreadth is not a complete answer, however, either to the litigants in *Cook* or to the questions presented in the case. An overbreadth ruling looking only to the facial unconstitutionality of the school board policy and specifying only its impermissible applications would profit the plaintiffs little. It appears likely, from a reading of the trial record,[145] that the primary motive for passage of the policy in the first instance was to bar children of public schoolteachers from Calhoun Academy. Having been advised only that their regulation did too much, and without being told what it might permissibly do, the board may well redraft a more narrowly defined policy which strikes precisely and solely at racially discriminatory private schools. This new policy would again veto the activities of the newly reinstated plaintiffs and result in their discharge. Another round of expensive litigation would ensue over the original question of whether the plaintiffs could constitutionally be discharged, this time under a properly drafted regulation, for enrolling their children in a segregated academy. Alternatively, the board might be cowed by invalidation of their original policy, and abandon their attempts to protect the Calhoun County school system from the damage they perceived in the activities of these plaintiffs. If a narrowly drawn regulation could constitutionally proscribe certain of these activities, a failure by the board to act may seriously impede Calhoun County's progress toward a racially nondiscriminatory school system and unnecessarily damage the educational process.

Although the overbreadth doctrine may be criticized as requiring little hard thinking and a minimum of specific analysis, in the process

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[144]United States v. Dellinger, 472 F.2d 340, 356 (7th Cir. 1972).

[145]R. 210.

of determining overbreadth courts commonly specify the expressive activity touched by the challenge that may constitutionally be limited.[146] An overbreadth ruling in those cases often has the salutary effect of defining precisely, under familiar principles of constitutional law, the activity that may be proscribed. State officials may then, with some degree of certitude, redraft a proper enactment along constitutionally permissible lines. Some indication of the proper bounds of governmental regulation is particularly crucial in this instance, where those limits are not at all settled or apparent. Unfortunately, the determination of those limits is a question demanding an analysis more extensive than a judicial aside.

Notwithstanding the judicial reluctance to decide constitutional issues when those issues can be avoided, the proper and final resolution of the controversy in this case requires that its central question be addressed: May a school board constitutionally prohibit public schoolteachers from enrolling their children in private, racially discriminatory academies?

IV. The Appropriate Constitutional Standard

A. The Balancing Test

In determining the constitutionality of a governmental enactment restricting first amendment freedom, it is first necessary to determine the applicable standard of constitutional review. In other cases, the reconciliation of first amendment rights and state interests which infringe on those rights has traditionally involved a weighing of interests under one of two tests. In one the state has the burden of showing a "compelling interest" sufficient to justify the restriction of individual rights.[147] The second test involves a "balancing" of the interests of the state against the rights of the affected individual.[148] Whether the test is denominated as one of a "compelling state interest" or of "balancing," in the final analysis decision is reached according to the relative weight of competing interests. Regardless of the test chosen, once an infringe-

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[146]*See* Broadrick v. Oklahoma, 413 U.S. 601, 616-17 (1973); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Aptheker v. Board of Regents, 378 U.S. 500 (1964); James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972). *But see* Shelton v. Tucker, 364 U.S. 479 (1960).

[147]NAACP v. Button, 371 U.S. 415, 438 (1963); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Sweezy v. New Hampshire, 354 U.S. 265 (1957).

[148]United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564-67 (1973); Pickering v. Board of Educ., 391 U.S. 563 (1968); Konigsberg v. State Bar, 366 U.S. 36, 50-52 (1961); Barenblatt v. United States, 360 U.S. 109, 126 (1959); American Communications Ass'n v. Douds, 339 U.S. 382, 400 (1950).

ment of first amendment values has been established, the burden of justifying the challenged policy lies on the government.[149]

Current methodology in reconciling conflicting interests in the public employee context is essentially reflected in the accurate but incomplete analysis adopted in *Pickering v. Board of Education*.[150] In *Pickering* a public schoolteacher in a letter published in a local newspaper criticized the school board for its handling of revenue proposals for the school system. Claiming that publication of the letter was detrimental to the efficient operation of the schools, the school board discharged the teacher. Pickering sued for reinstatement, but the trial court and the Supreme Court of Illinois upheld the discharge.[151] The United States Supreme Court reversed, holding that the writing of the letter was within the teacher's first amendment rights, even though many of the critical statements in the letter were concededly false.[152]

In its decision, the Court, after affirming that teachers in the public schools do possess first amendment protections, set forth its basis of decision:

> At the same time, it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. *The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services through its employees.*[153]

This "balancing test" at first glance might appear to be a panacea for cases such as *Cook*: All one need do is balance the competing interests; the weightier interest prevails. To balance such interests, of course, means little or nothing; it is impossible to "weigh" first amendment rights of the individual against the right of the state to protect its legitimate interests; such abstract concepts have no inherent values determi-

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[149][N]either the burden of going forward nor the burden of proof shifts to the state until it has been established by the complainant that he has been dismissed for exercising his constitutional rights. At that point, the State assumes the burden of justifying its action by showing that the complainant's activities "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 206 (5th Cir. 1971) (citations omitted); *see* Healy v. James, 408 U.S. 169, 184 (1972); Shanley v. Northeast Independent School Dist., 462 F.2d 960, 969 (5th Cir. 1972); James v. Board of Educ., 461 F.2d 566, 574 (2d Cir. 1972); Doherty v. Wilson, 356 F. Supp. 35, 40-41 (M.D. Ga. 1973).

[150]391 U.S. 563 (1968).

[151]36 Ill. 2d 568, 225 N.E.2d 1 (1967).

[152]391 U.S. at 566-67, 578-82.

[153]*Id.* at 568 (emphasis added).

native of superiority. Since we have no inherent values, we must have instead a fulcrum, a mid-point beyond which the first amendment exercise may not extend without tipping the see-saw in favor of the state.

After stating the need for a balancing test, the Court rejected the adoption of any universal factor by which the interests are to be reconciled, because of the "enormous variety of possible fact situations."[154] Instead, the Court merely suggested, in the context of the case, some considerations which should be weighed: the need for interdepartmental harmony which might be jeopardized by first amendment activity; whether the employee's first amendment activity involved purely work-related grievances; whether the expressive activity was of a kind which evidenced unfitness or incompetence; and the need for a showing that the employee's job performance has been or is likely to be less effective owing to first amendment activities.[155] The Court's analysis implied, however, that the enumerated factors were illustrative only and that each case must be decided on its own relevant facts and considerations. Illustrative or not, the *Pickering* analysis does suggest an acceptable constitutional frame of reference. The dispositive factor upon which the test is based is the degree to which professional effectiveness is lowered by the first amendment activity in question. In any case involving the discharge of a teacher for the exercise of first amendment activities, one must ask: Does the first amendment activity of this teacher impede to an unacceptable degree his ability to perform effectively his role in the educational process? This test emphasizes the need to establish a connection between the teacher's questioned activity and the requirements of his position. The public employment relationship provides the only justification for restricting the first amendment rights of teachers to a greater extent than expressive activity by the general public.[156] Therefore, before the state can treat the teacher as a unique constitutional animal, the first amendment exercise at issue must be shown to be within the scope of that relationship, connected to the role of the teacher in the educational process.[157]

In *Berry v. Macon County Board of Education*,[158] an unreported

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[154]*Id.* at 569.

[155]*Id.* at 569-73.

[156]*Id.* at 574. The plaintiff prevailed in *Pickering* in large part because the first amendment activity there did not relate closely to the performance of his duties. *See* Van Alstyne, *supra* note 48, at 850-53.

[157]*See,e.g.*, Cole v. Choctaw County Bd. of Educ., 471 F.2d 777, 779 (5th Cir. 1973); Sosa v. Board of Managers, 437 F.2d 173, 176-77 (5th Cir. 1971); Kiiskila v. Nichols, 433 F.2d 745, 750 (7th Cir. 1970), *appeal after remand*, 466 F.2d 626 (1972).

[158]C.A. No. 875-E (M.D. Ala. July 23, 1971).

district court opinion cited by the appellants in *Cook*,[159] we see an example of absence of relationship between prohibited first amendment activity by the public employee and the requirements of that employee's job. Although the case is generally unsatisfactory, this absence makes it readily distinguishable from the situation represented by *Cook*.

In *Berry* the board of education was attempting to retain as many whites as possible in the public school system. In conjunction with that effort, the board required all school employees to enroll their children in the public schools. The plaintiffs, a foreman of the school bus mechanics and a bus driver, sent their children instead to an all-white private academy. As in *Cook*, the plaintiffs were discharged.

In ordering reinstatement for the plaintiffs, the district court engaged in no real analysis of the competing interests involved. Rather, the court perfunctorily noted that the plaintiffs had a constitutional right to enroll their children in a private school, that the school's regulation had abridged that right, and that public employees cannot be discharged solely for the exercise of constitutional rights. The court did not mention *Pierce v. Society of Sisters* or any other case in its assertion of the plaintiffs' constitutional rights, perhaps because the court did not seem to view the rights of the plaintiffs as related to the first amendment,[160] although the case yields no indication of any other constitutional source for the asserted rights. The court omits any mention of *Pickering*, any discussion of a balancing of competing interests, or any recognition of the interests of the state in the matter.

Even had the court made a proper analysis, however, it is likely that the result would have been the same, for there is little connection between the duties of the plaintiffs in the performance of their jobs and the expressive activity in which they were engaged. The driving and maintenance of buses will hardly be affected if the employees who perform those functions enroll their children in a racially discriminatory school.

Pickering, by its rejection of general standards, assigns no weight to any of the competing individual and governmental issues which are to be balanced. Nor does *Pickering* delineate the severity of impediment to job performance which must exist before first amendment rights may be restricted. The only accurate generalizations *Pickering* affords are that first amendment freedoms are qualified rights, not absolutes,[161] and

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[159]Brief for Appellants, Exhibit A, at 1a, Cook v. Hudson, 365 F. Supp. 855 (N.D. Miss. 1973).

[160]A public employee cannot be discharged in his job solely because he had exercised his constitutional right of free speech. *Pred v. Board of Education*, 415 F.2d 851 (5th Cir. 1969). Nor are first amendment rights the only rights deserving of protection.

Id. at 4a.

[161]*See* Grossman, *supra* note 37, at 115.

that when applied in the context of public employees, those rights can be qualified to a greater extent than can expressive activities of other citizens.[162]

The public employee and school cases since *Pickering* do not, with any acceptable consistency, adequately formulate the degree of interference in the goals and operations of public agencies that will be tolerated in the name of first amendment exercise.[163] What is needed is some intelligible expression of the weight to be given to the first amendment interest in public employee cases. Such a criterion may, however, be emerging, although its use is often haphazard and not central to the logic of the cases employing it. It is a criterion that has been used in a variety of contexts in a number of public school cases.[164] *Lusk v. Estes*[165] expresses it well:

> Only if the exercise of these rights by the teacher *materially and substantially impedes* the teacher's proper performance of his daily duties in the classroom or disrupts the regular operation of the school will a restriction of his rights be tolerated.

We take, then, as the determining factor in the balancing of the competing interests, whether the teacher's actions impose, or are likely to impose,[166] a material and substantial impediment to the role of that teacher in the educational process. First amendment activities any less disruptive may not constitutionally be limited by school regulation.[167]

We choose the "material and substantial impediment" test because it provides a good median expression of the strength of first amendment

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[162]391 U.S. at 568.

[163]Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970); Birdwell v. Hazelwood School Dist., 352 F. Supp. 613 (E.D. Mo. 1972), *aff'd*, 491 F.2d 490 (8th Cir. 1974); Dougherty v. Walker, 349 F. Supp. 629 (W.D. Mo. 1972); Wilderman v. Nelson, 335 F. Supp. 1381 (E.D. Mo. 1971), *rev'd and remanded*, 467 F.2d 1173 (8th Cir. 1972); Hanover Township Fed'n of Teachers v. Hanover Community School Corp., 318 F. Supp. 757 (N.D. Ind. 1970), *aff'd*, 457 F.2d 456 (7th Cir. 1972).

[164]*See* Healy v. James, 408 U.S. 169, 189 (1972); Grayned v. City of Rockford, 408 U.S. 104 (1972); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); James v. Board of Educ., 461 F.2d 566, 571 (2d Cir. 1972); Fluker v. Alabama State Bd. of Educ., 441 F.2d 201, 206 (5th Cir. 1971); Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966); Parducci v. Rutland, 316 F. Supp. 352, 355-56 (M.D. Ala. 1970).

[165]361 F. Supp. 653, 660 (N.D. Tex. 1973) (emphasis added).

[166]See text accompanying note 175 *infra*.

[167]We construe an impediment to effective teaching to include more than an inability to teach conjugation and multiplication. A teacher may likewise be ineffective to the extent that his perceived racial bias results in the creation or perpetuation of harmful socio-psychological effects. See text accompanying note 189 *infra*.

We are aware of the talismanic effect of "catch" phrases in the law. We suspect that expressions such as "compelling state interest" are, often as not, *post hoc* justifications for *a priori* decision-making. We insist here on the adoption of some standard simply

values when applied to public employees. All first amendment formulae determine the amount of permissible regulation of expressive activities by relating those activities to other societal values they endanger. The probability of the occurrence of the harm, together with the magnitude of that harm, determine the protection accorded the expressive activity in any case.[168] Logic and precedent[169] insist that the special interest of the state in controlling the activities of its employees must reduce first amendment protection of public employees below the "compelling state interest" level that prevails when restrictions are placed on the expressive activities of the populace as a whole.[170] At the same time, the extension of first amendment protection to public employees, if it is to have any meaning whatever, must incorporate some standard more stringent than the "rational relation to a legitimate state interest" criterion that is the minimum requirement under the equal protection clause.[171]

B. The Matter of Proof

Pickering and related cases[172] require that before the state may discharge an employee for the exercise of some constitutionally protected right it must produce some more or less specific evidence that the expressive activity would cause the requisite degree of harm to the claimed state interest. No presumption of harm per se is sufficient to defeat conflicting first amendment values.[173] The formulation of the appropriate constitutional standard in judging school regulations which

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because the *Pickering* mandate to balance competing interests when considered in isolation leads to nothing more than *ad hoc* adjudication of first amendment freedoms, and is even more meaningless than a simplistic phrase which attempts to assign weight to competing interests.

[168]Compare Brandenberg v. Ohio, 395 U.S. 444, (1969); Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting); Schenck v. United States, 249 U.S. 47 (1919); Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917). See note 170 *infra*.

[169]*See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

[170]*See* Williams v. Rhodes, 393 U.S. 23, 31 (1968); United States v. O'Brien, 391 U.S. 367 (1968); NAACP v. Button, 371 U.S. 415, 438 (1953). *See generally* Branzburg v. Hayes, 408 U.S. 665 (1972).

[171]One commentator, dissatisfied with the imprecision of the balancing test, would substitute the protection of the due process clause. Grossman, *supra* note 37, at 117-19. Under this suggested formulation, a public employee could be discharged for the exercise of first amendment freedoms so long as the employer could establish "a 'rational nexus' between the offensive speech and the employment of the offender." *Id.* at 119. While this rational relation standard might satisfy Grossman's thirst for predictability and certainty, it would also make first amendment rights irrelevant to the public employee.

[172]*See, e.g.*, James v. Board of Educ., 461 F.2d 566, 571-73 (2d Cir. 1972); Kiiskila v. Nichols, 433 F.2d 745, 749-50 (7th Cir. 1970).

[173]Pickering v. Board of Educ., 391 U.S. 563, 570-73 (1968); *see* Van Alstyne, *supra* note 48, at 849.

affect first amendment interests is clearly a matter for the courts. But when, as in the present case, that constitutional test depends on a determination of a quantum of educational damage, the courts must, to some extent, give way to educational experts who are particularly competent to define factors which affect the learning process.

In *Cook v. Hudson*, substantial evidence was supplied by two educational psychologists who testified as expert witnesses on the general harmful effects of the associational activities we are considering on students in the public school. This testimony was based not on examination of the particular students affected by the teachers' activities, but on research conducted by the witnesses and others in the field in situations analogous to the present case.[174] If the described harm is found to be sufficiently substantial, either alone or in conjunction with other deleterious effects, to overbear the first amendment rights of the plaintiffs, is this type of generic or expert testimony sufficient to establish the occurrence of that harm? Or is more specific evidence required, evidence of the effects of the activity on the students in classes taught by the teachers?

A number of cases assure us that it is not a prerequisite to affirmative school board action that the harm threatened by the expressive activity of the teacher already have occurred.[175] A showing of the likelihood of damage to the goals and operation of the school constitutes sufficient evidence; an unsupported allegation of impending damage will not satisfy the evidentiary demands.[176] Some threat—a genuine likelihood of harm supported by reasonable inferences—must exist.

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[174]R. 107-51.

[175]Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508-09 (1969); Shanley v. Northeast Independent School Dist., 462 F.2d 960, 970 (5th Cir. 1972); James v. Board of Educ., 461 F.2d 566, 571-73 (2d Cir. 1972); Birdwell v. Hazelwood School Dist., 352 F. Supp. 613, 621 (E.D. Mo. 1972), *aff'd*, 491 F.2d 490, 494 (8th Cir. 1974).

[176]Kiiskila v. Nichols, 433 F.2d 745, 750 (7th Cir. 1970). Murray v. Jamison, 333 F. Supp. 1379 (W.D.N.C. 1971), provides the best example. There, the Grand Dragon of the Ku Klux Klan of North Carolina was discharged from a public position in which he came into frequent contact with blacks. Although the court ruled the discharge unjustified, it also noted that the employee's association could constitutionally be the basis for a discharge.

> If membership in the Klan does prevent adequate performance of public duty it may be cause for discharge or discipline. . . . However, in the absence of a showing that Klansmanship has produced or is genuinely likely to produce a lower quality of performance of the employee's duties, the constitutional rights of free speech and free association and the interests of society in the encouragement of free thought and debate prevent public authorities from discharging public employees merely because of views and associations not approved by the temporary bearer of the supervisory duty.

Id. at 1381-82. The defendants lost in *Murray*, not because of any absolute rights of

Threats and likelihood are of course prospective and require prediction based on data accumulated in other analogous situations.

In evaluating the danger that the affiliational activities we are here considering pose to the educational process, expert testimony is especially appropriate. As we shall see, a great deal of the total impediment to teacher efficacy presented by enrolling children in a racially discriminatory institution is socio-psychological in nature. As such, the subject matter presents the classic situation in which expert generic testimony is necessary: The subject matter is so distinctive and esoteric, related as it is to the disciplines of education and psychology, that it is beyond the normal range of lay experience.[177] The expert's special training allows him to draw from the facts those logical inferences which are not apparent to the uninitiated.

The most spectacular example of a court giving dispositive effect to expert opinion on socio-psychological effects caused by discriminatory activity is *Brown v. Board of Education.*[178] In ruling that segregated schools deny equal educational opportunities to blacks, the Court relied on generic evidence that segregation causes, in the black student, a sense of inferiority and depression that adversely affects the child's motivation to learn. No attempt was made to discover whether those effects had actually resulted from segregation in the case at hand. The inferences drawn by the experts were accepted as applying to all cases which shared certain critical facts. Further, there is no indication that in later school desegregation cases the plaintiffs were forced to demonstrate that the *Brown*-recognized effects had occurred in each factual context. *Brown* recognized that educational and psychological inferences, when adequately empirically based, are reliable; and that if they are not allowed, no viable alternative exists for getting proof of these very real effects before the court.[179] Thus, expert testimony of the kind presented in *Cook*, if otherwise credible, is sufficient to prove the effects it describes.

C. The Problem of Parental Motive

In judging the constitutionality of any governmental enactment that proscribes certain associational activities, one difficulty persis-

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employees to associate as they choose, but because they failed to carry their burden of proof. The only evidence presented to support the charge that the plaintiff's association with the Klan reduced his job effectiveness was the unsupported opinion of the defendant's attorney. Had specific evidence of actual or likely adverse effects been produced, it is clear that the plaintiff's discharge would have been upheld.

[177]*See* C. McCormick, Evidence §§ 13-17, at 29-37 (2d ed. E. Cleary 1972).

[178]347 U.S. 483 (1954).

[179]*See* text accompanying note 102 *supra*.

tently arises: the danger of creating unwarranted irrebuttable presumptions. It could be argued, for example, that any regulation which bars teachers from participating in segregated education erroneously presumes that all parents involved in such an activity are racially biased.[180] Similarly, it could be contended that a policy which prohibits public schoolteachers from enrolling their children in racially discriminatory schools is overbroad, in that it deters activities which may not constitutionally be prohibited, viz., placing a child in a racially discriminatory school for nondiscriminatory motives, as well as activities which may legitimately be proscribed, including the same act when performed in a spirit of racial malice. Whether this argument treats the defect as an irrebuttable presumption, or as an extension of the overbreadth doctine, our response and analysis are the same. The central questions in either case are whether a discriminatory intent can legitimately be inferred and, if it cannot, whether a discriminatory intent is essential to uphold the policy.

Through a line of cases dealing with subversive advocacy, the United States Supreme Court has served notice that statutes designed to penalize public employees on the basis of their associational activities alone, without regard to the intent of the employees to bring about the evils to which the statutes are directed, are unconstitutionally overbroad.[181] Expressed differently, individual beliefs may not be presumed from association with groups which have institutionally embraced certain beliefs.

This specific intent requirement in the subversive advocacy context was expounded in the trilogy of *Elfbrandt v. Russell*,[182] *Keyishian v. Board of Regents*,[183] and *United States v. Robel*.[184] In each case, the government barred from public employment individuals who were knowing members of groups that had as a purpose the violent overthrow of the government. In each case, the punitive effect of the statute was triggered only by the individual's knowledge of the unlawful goals of the organization. The Court struck down all three laws, holding that "mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from [public employment]."[185] In order for a dismissal of

[180]Brief for Appellants, at 53, Cook v. Hudson, 365 F. Supp. 855 (N.D. Miss. 1973).

[181]To trace the development of the specific intent requirement, see Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Adler v. Board of Educ., 342 U.S. 485 (1952); Wieman v. Updegraff, 344 U.S. 183 (1952); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Elfbrandt v. Russell, 384 U.S. 11 (1966); Keyishian v. Board of Regents, 385 U.S. 589 (1967); United States v. Robel, 389 U.S. 258 (1967).

[182]384 U.S. 11 (1966).

[183]385 U.S. 589 (1967).

[184]389 U.S. 258 (1967).

[185]Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967).

public employees to stand, a showing was required that the individual personally advocate the illegal purpose of the group of which he is a member.

All of this has significance for our inquiry. If a government policy prohibits public schoolteachers from associating with segregated private academies, we confront an analogous situation. Such a policy does not contemplate the intent with which any individual parent sends his child to the private school, and makes no effort to ascertain the beliefs of the parent in regard to the desirability of a unitary school system; therefore, the regulation arguably violates *Keyishian* and related cases by penalizing the parent-teacher for his associational ties without regard to, or with a conclusive presumption of, his motives in embracing this association.

Although the specific intent or irrebuttable presumption argument is appealing and will influence our balancing of competing interests, it is not dispositive in cases of this sort. The specific intent rationale does not consider damages to the educational system which may result regardless of the intent with which they are undertaken. The protection given by the specific intent test is absolute. It says, in effect, that no impediment to the educational process sufficient to justify discharge can arise from associational activities undertaken in the absence of a motive by the teacher to bring about that harm. The specific intent test is undesirable in the present case because it fails to take into account the empirical effects associational activities may have on the performance of educational duties.

The balancing test adopted by *Pickering* is the proper test in these circumstances. It is more comprehensive and considers, in a way that the specific intent test does not, the pragmatic factors justifying discharge of public employees. The balancing test focuses on the harm to the educational process which alone justifies restrictions on first amendment exercise. It appreciates that the interests of the public employer may be substantially damaged by first amendment activity performed without any specific intent by the actor to bring about that harm. Under the balancing test, it is immaterial whether the material and substantial interference with the educational process which results from intentional expressive activity is accompanied by a motive on the part of the teacher to cause that interference.

At issue in *Elfbrandt*, *Keyishian*, and *Robel* were government regulations which barred subversives from the public employ. A finding of specific intent to perform the specified evil was required, because intent was prerequisite to the active harm feared in those situations—the violent overthrow of governmental institutions. Those individuals could not cause, by mere associational activity, any harm that would justify discharge. In *Robel*, the Court clearly recognized why the specific intent

test was appropriate there, and by implication, why it does not control here. "The statute quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it."[186] *Robel* recognizes that restricted first amendment activity must have a causal relationship to the evil sought to be prevented.

As we will demonstrate, a significant number of pernicious empirical effects may flow from the actions of public schoolteachers in sending their children to all-white private academies—with or without any conscious intent on the part of the offending teacher to bring them about. The motives of the teachers may simply not be essential "[t]o establish that an individual's association poses the threat feared by the Government in proscribing it."[187] The danger of harm to the educational process, therefore, may appear independently of intent.

The specific intent test does have one significant application to our problem. Since a school board policy which prohibits association with groups practicing racial discrimination may be upheld because of the substantial and material impediments threatened by that association, the specific-intent test affects our balancing of interests to this extent: In determining the degree and nature of those impediments, we may only consider those injuries which may arise independently of any attitudes presumed held by the teacher. To the extent that racial prejudice on the part of a teacher is a *sine qua non* of an adverse effect, that effect may not be employed as a justification for the school board policy. Only impediments resulting from association *qua* association may justify a policy which restricts associational activities without regard to motive. Further, the liberal application of standing accorded parties in the first amendment area makes it irrelevant that the discharged teachers, as in *Cook*, actually do possess a biased frame of mind that would produce a host of additional injuries. Regardless of the status of the parties, the policy must stand or fall on those justifications which occur independently of the state of mind of the teacher.[188] Thus, employing our constitutional standard of substantial and material harm to the role of the teacher in the educational process, we must balance the competing governmental and individual interests involved in a policy that proscribes teacher associations with racially discriminatory schools, cognizant of

[186]389 U.S. at 265.

[187]*Id.*

[188]It should be emphasized that all we have said applies with equal force to an objection that such a policy would create an irrebuttable presumption of the sort condemned in Cleveland Bd. of Educ. v. LaFleur, 94 S.Ct. 791 (1974) (school maternity leave regulations creating an irrebuttable presumption of unfitness requiring pregnant teachers to take a leave of absence beginning with their 6th month of pregnancy).

our constitutional obligation to consider only those governmental interests likely to be damaged regardless of any racial attitudes held by the teacher.

V. May The Teachers Be Fired?

Associational activities of the kind typified in *Cook v. Hudson* may present variable threats to the desegregational and educational interests of the state in the public schools; variable because in any given case the state's interest may be threatened to a degree more or less intense according to the existing situation in the school and the community. Consequently, our analysis must be limited to the ways in which the role of the public school may be damaged by the association, with the outcome in any individual case depending on an application of the appropriate constitutional test to the extent of harm revealed by the developed facts.

We see a possibility of harm arising from *Cook*-like teacher activity in five principal ways: (1) by lowering the academic achievement of blacks; (2) by furthering racial disparity and distrust; (3) by alienating public school faculty members; (4) by reducing community support; and (5) by aiding white flight from the public schools.

Whether there is a likelihood of such pernicious effects is of course a different question which is determinative in *Cook* and in similar cases. The burden of proof is on the state, however, and in the face of the countervailing first amendment rights of the teachers, that burden is a heavy one.

A. Lowered Academic Achievement by Blacks

The principal testimony at the trial dealing with harmful effects growing out of the teachers' activity concerned the consequence of lower teacher expectations for black students. This is the "Pygmalion Effect" which asserts that the teacher will so manifest his lower expectation that the child or children will perceive it and obligingly perform at the anticipated lower level.[189] The Pygmalion Effect, or "self-fulfilling prophecy,"[190] has generally been accepted as an accurate sociological precept.[191]

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[189]*See, e.g.*, R. Rosenthal & L. Jacobson, Pygmalion in the Classroom 98-118 (1968); Loretan & Ulmans, *Teaching the Disadvantaged,* in Education for What? 199, 201 (C. Monson, Jr. ed. 1970).

[190]Merton, *The Self-Fulfilling Prophecy*, in Social Theory and Social Structure 179 (R. Merton ed. 1968).

[191]*See, e.g.*, United States Comm'n on Civil Rights, Racial Isolation in the Public Schools 96 (1967); Smith, *Imperative Issues in Urban Education*, in Education for What? 176, 178 (C. Monson, Jr. ed. 1970); Cohen, *Defining Racial Equality in Education*, 16 U.C.L.A.L. Rev. 255, 274 (1969).

We believe, however, that in the *Cook* situation, evidence concerning the Pygmalion Effect is irrelevant. Although the court in *Cook* found that the teachers there acted to avoid desegregated education, at no point was there a finding that the teachers felt blacks to be intellectually inferior, nor does such an assumption logically follow such a finding. The Pygmalion Effect addresses itself only to perceived lower expectations. There was no showing of the expectancy nor is there a basis for assuming the perception. Therefore, we are not at all persuaded by the testimony of the educational psychologists.

More importantly, as we have demonstrated, a school policy barring associational activities without regard to the motive with which those activities are undertaken cannot be justified by presuming any motive on the part of the individuals who participate in those activities. Thus, the testimony of the educational psychologists in *Cook*, resting as it does on the presumed attitude of the teachers, is based on an impermissible assumption. Even though the present plaintiffs in *Cook* may actually possess the lowered expectations described by the educational psychologists, the overbreadth doctrine insists that the constitutionality of the policy be considered on its face, without regard to the status of individual litigants. Thus, it is clear that evidence premised on a presumed mental attitude is inadmissible.

It has been posited, however, that perceived teacher prejudice will result in lower academic achievement, not necessarily because of actual lower expectations, but simply through perceived dislike and racial animosity. We may not presume intent here, but we may take note of natural reactions to the teachers' activity, and at least some black students will surely perceive racial animosity on the part of their teachers. Will this result in lower academic achievement?

According to some sociological reports, when black students perceive aversion and antipathy from a teacher, they are disinclined to achieve as they would under more favorable conditions.

> One of the axioms of educational psychology is the statement that a child learns only when he is motivated to learn. Furthermore, the basic incentives which a teacher can furnish are her acceptance of the child on the one hand, and approval on the other.[192]

The educational psychologists who testified at the trial stated that evidence today indicates that learning is best in a positive atmosphere, and when a child perceives that a teacher dislikes him or members of his race, the child's achievement level will be depressed.[193] Evidence of

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[192]Davidson & Lang, *Children's Perception of Their Teachers' Feelings Toward Them Related to Self-Perception, School Achievement and Behavior*, 29 J. EXPERIMENTAL EDUC. 107, 112 (1960).

[193]Interviews by telephone with Drs. F.J. Eicke and G.E. Harlan, May 17, 1974.

lowered learning levels was also forthcoming from a sociological study conducted in the early 1970's by the Riverside Research Institute of New York State. The study indicated that "the behavior of teachers affects students' racial attitudes."[194] The researchers hypothesized that a black student who perceives that the teacher is prejudiced against him will not achieve as well as one who does not perceive such prejudice.[195]

On the other side of the statistical fence we have the *Coleman Report*[196] which indicates that there is no significant correlation between perceived teacher attitudes toward integration and the academic achievement of Southern blacks.[197] In *Inequality*, a more recent study by Christopher Jencks, it was concluded that:

> There is no evidence that school reform can substantially reduce the extent of cognitive inequality, as measured by tests of verbal fluency, reading comprehension, or mathematical skill. Neither school resources nor segregation has an appreciable effect on either test scores or educational attainment.[198]

Although the indicators of a depressive effect are perhaps more numerous, because of the preeminent stature of the *Coleman Report* and the study conducted by Jencks in *Inequality*, and because of their finding that the depressive effect of perceived teacher bias is at most nominal, we conclude that a finding that academic harm will accrue from these teachers' actions has no adequate basis here.

B. Increased Racial Disparity and Distrust

One of the primary goals of education today is the lowering of racial barriers between whites and blacks.[199] The public schools are intimately bound to that goal of promoting racial unity, and should there be a demonstrable likelihood that the plaintiffs in *Cook* have substantially impeded that goal, the school board could constitutionally prohibit action producing such an impediment.

Unfortunately, there has been little definitive research as to the

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[194]S. Koslin, B. Koslin & R. Pargament, Efficacy of School Integration Policies in Reducing Racial Polarization, Sept. 1972, at 14 (paper presented to the American Psychological Association, Honolulu, Hawaii).

[195]*Id.* Note that the paper admits that in this regard the study is only to be considered preliminary because of the small number of teachers in the sample. No concrete factual data on this hypothesis was given.

[196]2 COLEMAN REPORT (Supplemental Index).

[197]*See* Dyer, *School Factors and Equal Educational Opportunity*, 38 HARV. EDUC. REV. 38, 49 (1968) (table 3a).

[198]C. JENCKS, INEQUALITY 8 (1972).

[199]*See* note 85 and accompanying text *supra*. *But see* Armor, *The Evidence on Busing*, THE PUBLIC INTEREST, Summer 1972, at 90.

extent of perceived bias on students:

> Although many people continue to believe that teachers have a direct influence on the development of racial attitudes in children, this view is not supported by any substantial body of evidence. There have not been enough specific studies of the role of the schools in the development of racial attitudes of children; the real extent of their influence is unknown.[200]

This statement was made in 1963, and although more recent studies have addressed themselves to the effect of perceived teacher bias as a racially disjunctive factor, and have indeed found a divisive effect,[201] those studies are not dispositive here.

The studies were concerned primarily with in-class manifestations of unequivocal racial prejudice, where the attendant perception is both predictable and intense. For example, Kenneth Clark's finding of a decisive effect by teachers on students' racial attitudes was based on a situation in which a teacher racially segregated students in a classroom seating arrangement.[202] Blatant activity such as this is a far cry from the *Cook* situation in which teacher action is extramural and ambiguous.

Furthermore, there is strong evidence that regardless of his attitudes and abilities, a teacher has a de minimis effect on his pupils.

> Our research suggests, however, that the character of a school's output depends largely on a single input, namely the characteristics of the entering children. Everything else—the school budget, its policies, the characteristics of the teachers—is either secondary or completely irrelevant.[203]

Additionally, we must view the potential effect on the black child, not in a vacuum, but in the context of the entire school environment. While these three teachers created, by their actions, a possibility of perceived teacher bias, many others did not. The presence of these outwardly unbiased teachers would mitigate against any generalized inference by black students that white teachers are racially biased. Similarly, the presence of whites in the student body[204] would evidence good faith and racial acceptance, countering the harmful effects, if there indeed were any, which might flow from perceived teacher bias.[205]

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[200]K. CLARK, PREJUDICE AND YOUR CHILD 31 (2d ed. 1963).

[201]UNITED STATES COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 99 (1967); *Smith, Imperative Issues in Urban Education*, in EDUCATION FOR WHAT?176, 178 (C. Monson, Jr. ed. 1970); Lieberman, *Teachers and the Fourteenth Amendment—The Role of the Faculty in the Desegregation Process*, 46 N.C.L. REV. 313, 340 (1968).

[202]K. CLARK, PREJUDICE AND YOUR CHILD 31-32 (2d ed. 1963).

[203]C. JENCKS, *supra* note 198, at 256.

[204]The number of white students attending the public school is not known. No racial breakdown of the student body was given at trial.

[205]There may be a potential for creation of a proselytizing effect on some white stu-

Therefore, any furtherance of racial bias or disparity is either too speculative to constitute a likelihood of harm, or is so limited as to be de minimis and therefore not sufficient to constitute a material and substantial impediment.

As in *Brown v. Board of Education*,[206] the district court opinion posits as a valid justification of the board's policy the possibility that the black children will perceive rejection and "experience a sense of inferiority . . . ."[207] Unlike *Brown*, however, which involved a statewide, state-imposed segregated school system, *Cook* involves an isolated instance of perceived, not actual, prejudice, and the possibility of resultant feelings of inferiority is greatly reduced. Further, a sense of inferiority is not produced by a single confrontation with racial bias.

> The significance to the Negro of this psychological harm—both the insult and the stigma—depends on a multitude of variables: family environment, wealth, social relationships outside the school, the quality of his previous and subsequent schooling, individual self-confidence, and intellectual capacity.[208]

It thus would be unreasonable to assume that an inferiority complex could result solely from teacher activity of this sort. In certain instances, previously acquired feelings of inferiority could be reinforced by such perceived rejection; however, any sense of inferiority experienced through these kinds of associational activities is insufficient to warrant a restriction of first amendment freedoms.

C. Intra-Faculty Alienation

It is difficult to imagine many activities which carry a greater potential for destruction of interpersonal faculty relationships than does the enrollment of a child in a racially discriminatory school by a public schoolteacher. It is certainly reasonable to expect that black teachers, and many white teachers, would be offended and angered, suspecting a malicious motive on the part of the parent-teacher.

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dents. The white child who interprets the teachers' actions in ensconcing their children in an all-white academy as an expression of racial bias may be influenced. Nascent seeds of prejudice in the child may be encouraged by the teachers' actions. *Cf. Developments in the Law—Academic Freedom*, *supra* note 83, at 1045, 1066. The available sociological data, however, is not convincing in terms of white students' reactions to perceived teacher bias. An insufficient amount of research has been done, and the evidence that is available indicates that the average white student, because of his different socio-economic background, is less susceptible than the average black student to such an influence. *See, e.g.*, COLEMAN REPORT 316-19.

[206] 347 U.S. 483, 493 (1954).

[207] Cook v. Hudson, 365 F. Supp. 855, 860 (N.D. Miss. 1973).

[208] Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 569 (1965).

It may be contended that any teacher who chooses a discriminatory private education for his child could surely explain the nondiscriminatory motives for such an action to his colleagues, thus assuaging any destructive effects. At the same time, we must realize that it will often be difficult, if not impossible, for such a teacher convincingly to explain his motives. Even a superficially plausible explanation may ring hollow in the ears of black teachers who have been confronted with white dissembling for a lifetime. Further, there is no guarantee that such an explanation will ever be attempted.

We question, however, just how necessary to the efficient operation of the schools is intra-faculty harmony. As *Pickering v. Board of Education*[209] indicates, a threat to harmony among co-workers may endanger the effective operation of a public institution. This threat is meaningful, however, only among "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning."[210] To a large extent, efficient education may proceed without that loyalty and confidence. Even with the increasing importance of "team teaching" which requires that several teachers work together closely in instructing a large, coordinated class, the vast majority of teachers work alone and thus require little job-related interaction. In *Cook* we have no evidence of necessary close working relationships, and the fact that co-workers may be angered is certainly not sufficient to curtail first amendment rights. Nor is the requisite cooperation of teachers on faculty committees, in work with the PTA, or in assisting extracurricular student activities adequate justification for such a curtailment. The harm to the efficient operation of the school, at least in this case, falls far short of constituting a material and substantial impediment to the teachers' effectiveness.

By rejecting this consideration as a general justification for restricting the first amendment rights at issue, we do not mean to say that discord among the faculty will not occur or can never constitute a sufficient basis for discharge. Situations may easily be imagined in which faculty discord may present an insuperable barrier to effective education. The realities of public education insist, however, that such cases will be exceptional ones, and that serious obstacles to public education from faculty discord cannot be presumed in the absence of a highly individualized showing. No such showing occurred or was suggested in *Cook*.

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[209] 391 U.S. 563 (1968).

[210] *Id.* at 570.

D. Reduced Community Support

The presence on the public school faculty of teachers who are perceived either as bigots or as simply disloyal to and unenthusiastic about the school in which they teach may serve to reduce community support for the public school system.[211] Any such harm will be subtle, most likely manifesting itself in a decline in attendance at PTA meetings and athletic events, little interest in "Back to School" activities, and a refusal to support, with money and time, various extracurricular activities. These considerations, although not insignificant, cannot be deemed a viable justification for the restriction of first amendment rights.

The loss of community support is, in cases such as *Cook*, a speculative result of teacher associational activities with racially discriminatory schools. Proof of its occurrence is extremely difficult. Further, in many cases, it is simply not a consequence of this type of teacher behavior. Loss of community support is rarely a sufficient justification for discharge of a teacher, and, in cases similar to *Cook*, is irrelevant to effective education.[212]

E. Aid to White Flight

Whereas the three effects previously discussed were based on the reaction of others—black students, co-faculty members, and the community—here we are concerned only with the import to be given to white flight to racially discriminatory schools. Here we will determine the extent and likelihood of harm which would flow from the contribution to white flight by these teachers.

We define "white flight" as the transfer of white students from desegregated public schools to predominantly white or all-white private schools.

Courts have frequently held invalid state support to all-white private schools on the theory that such support constitutes state action.[213] Where the support is purely private, however, this is not actionable under the 14th amendment. In *Cook v. Hudson* we have private action by the teachers, but it is not purely private since the plaintiffs are public employees. As we have seen, special characteristics pertain to the state employer-individual employee relationship, and although the individual has the protection of the first amendment, he nevertheless may be

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[211] *Developments in the Law—Academic Freedom*, *supra* note 83, at 1045, 1066.

[212] *Id.*

[213] *See, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973)(state supplied textbooks); Wright v. City of Brighton, 441 F.2d 447, 448-49 (5th Cir.), *cert. denied*, 404 U.S. 915 (1971)(leasing of public property); Taylor v. Coahoma County School Dist., 345 F. Supp. 891 (N.D. Miss. 1972)(sale of public property).

discharged upon a showing of substantial harm or the likelihood of such harm to his duties and to the school system growing out of his activities.

> Regulation of constitutionally protected freedoms, such as free speech, may be justified to prevent disruption of an activity which a state institution is charged by law with carrying out, or to prevent an impediment in the rendering of public services.[214]

As we have noted, that disruption or impediment must be material and substantial in order for the regulation to be constitutionally permissible. To what extent, then, does harm flow from this white flight by the teachers?

Two recent cases indicate the courts' concern with white flight. In *Gilmore v. City of Montgomery*,[215] all-white private schools were periodically given exclusive use of certain public recreational facilities by the city. In disallowing this use of public property, the Fifth Circuit noted its tendency to enhance the attractiveness of the private schools and stated:

> [W]e have recognized that the departure of white students and teachers into private educational institutions disrupts planned desegregation of the public school system and causes resegregation, that such "white flight" has the potential to reduce community support and resources available for public education, and that resulting racial isolation perpetuates the stigma long associated with racially segregated education.[216]

Similarly in *Plaquemines Parish School Board v. United States*,[217] where the school board was transferring public educational facilities to all-white private schools, the Fifth Circuit enjoined the school board's encouragement to white students to leave the public schools and go to the segregated private schools.

> The Board and the Council should remember that it is the *affirmative* duty of the school boards in this circuit to eradicate the last traces of the dual school system. Surely, the dismantling of this long-entrenched system cannot take place if public school officials actively are attempting to undermine the very existence of the public schools by word or deed.[218]

From this, if we view teachers as "officials," there would appear to be a

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[214]Wilderman v. Nelson, 335 F. Supp. 1381, 1383 (E.D. Mo. 1971).
[215]473 F.2d 832 (5th Cir. 1973); *rev'd in part on other grounds*, 94 S. Ct. 2416 (1974).
[216]473 F.2d at 836.
[217]415 F.2d 817 (5th Cir. 1969).
[218]*Id.* at 834-35.

clear case for preventing the teachers from sending their children to the academy. An additional argument may be made that the payment of salary by the state with subsequent use for tuition involves state action, with a funneling of state funds into a private school, and thus there is a duty to discharge the teachers in *Cook*.

We are not impressed by state action arguments in *Cook*. Initially, in the cases such as *Gilmore* and *Plaquemines Parish*, the charge against "officials" clearly is limited to city officials, members of the school board, and others of equal rank who are responsible for the formulation of policies and administrative decision-making and who were, in those cases, actively using public resources to aid discriminatory private education. As to the argument of the funneling of state funds, although the finding of "state action" has been greatly extended in recent years,[219] it is inconceivable that the use to which a state employee's salary is put could be interpreted to entail state action.

Even though the state does not have an affirmative duty to dismiss the teachers because of their contribution to white flight, the question of whether it may do so still remains. We believe that it cannot. White flight is not, in itself, a substantial evil. It rather is a shorthand way of expressing the potentially destructive effects which we have already dismissed as de minimis. Those effects are not rendered more substantial by collectivization; their intrinsic nature remains unchanged. They are and remain too speculative and insubstantial to justify abridgement of first amendment rights.

VI. Conclusion

The plaintiffs in *Cook v. Hudson*, then, may not be discharged for enrolling their children in a private, racially discriminatory academy. They are protected from the actual regulation by the first amendment overbreadth doctrine, and from a properly drafted policy by a failure by the school board to demonstrate that a substantial impediment to the educational process is likely to flow from associational activity of this sort.

The result in this one case, though, is perhaps less important than the analysis by which it is reached. Whenever first amendment exercises by the public employee are sought to be used by the state as a justification for discharge, we see no alternative to a forthright and thorough analysis of the types and extent of damage that is threatened to the public institution by the employee's expressive activity. Implicit in our thinking is a rejection of an absolutist view of the first amendment, and

[219] *See* Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 Colum. L. Rev. 855, 870 (1966).

a belief that instead, first amendment values in the public employee context can be intelligently assessed only by an examination of other societal values with which they are in conflict. The importance we as a society wish to attach to the freedom of our public servants to speak and associate as they choose will be determined, not by simplistic definitional phrases, but by the degree of interference we are willing to tolerate in the operation of our public instituitions. The fundamental problem of political life, the reconciliation of order and liberty, is nowhere presented more clearly than here.

To the extent that we are told by the courts in any case that the first amendment protects this public employee from discharge, or that legitimate state interests permit this interference with the first amendment interests of the employee, without more, we are badly served. A true understanding of the nature of the first amendment in the public employee context can be achieved only if, in every case in which first amendment interests are challenged, pains are taken to identify as precisely as possible the social interests threatened by their exercise. If uncertainty and unpredictability are concomitants of the first amendment balancing test, it is because judicial decision-makers have, until now, treated superficially the factors to be thrown into the balance. Predictability will arrive only with full exposition.

The question presented in *Cook* presents perhaps the poorest possible vehicle for use of the balancing test. The threats posed to the educational institution here are esoteric, grounded in sociology and educational psychology. Yet the relevant sociological and educational data is confused, confusing, and often contradictory. Too little work has been done in the field to admit definite answers to more than a few of the significant questions. The studies we have examined often base their conclusions on what seems to be empirical evidence of questionable validity. Our conclusion that a policy of the type promulgated in *Cook* impermissibly infringes on first amendment interests was based on a lack of faith in the evidence with which we were forced to deal as much as anything else.

Nevertheless, the field is not static. New evidence may be uncovered which reveals that a teacher who enrolls his child in a racially discriminatory private school causes severe damage to the state's interests in education.[220] Also, new cases may arise in which special

[220]It may be noted that if and when such evidence does appear, it would seem unlikely that the damage could be ameliorated by removing children from an all-white private school and returning them to public education. The perception of the teacher by students, faculty, and the community as racially prejudiced would remain, now intensified by a new perception—that of the teacher as a hypocrite. It would be consistent with the purposes of a justifiable school policy that a teacher who enrolled children in a racially discriminatory school at the time of passage of the policy be discharged without reprieve.

circumstances lend additional substantiation to a contention that the educational process in the community is being subverted by teacher activity. For example, we have not considered the case of a teacher who is, as a matter of fact, racially biased. It is clear that expressions of racial prejudice in the classroom would present a much stronger case for restrictions of first amendment rights. It is also probable that the totality of harm caused by a teacher whose expressions of racial prejudice are well-known and deeply felt may be so substantial as to justify discharge. New factors and considerations would arise, again to be examined within the framework outlined here.

Whatever the case, the distaste with which segregated private academies are viewed by many cannot be allowed to emasculate constitutional protections for associations which are unpopular but which have not been shown to be empirically destructive of institutional goals.

W. Wayne Drinkwater, Jr.
Charles Claiborne Barksdale

LIABILITY OF PRIVATE HOSPITAL EMERGENCY ROOMS FOR REFUSAL TO PROVIDE EMERGENCY CARE

A recent article in The Journal of the American Hospital Association[1] noted that trauma[2] was the number one killer of Americans under the age of 38, and the fourth largest killer of Americans of all ages.[3] The article cited statistics from the National Academy of Sciences which identified trauma as the cause of death of 155,000 Americans each year.[4] The article reported 69 million emergency department visits in 1972 of which approximately 20 percent were considered true emergencies,[5] and that "a high percentage of [these] true emergencies [could] be treated successfully if treated quickly and appropriately."[6] Unfortunately there is not always a legal right of access to emergency treatment in hospital emergency rooms. Based on the common law's refusal to recognize an affirmative duty to aid a person in peril, courts have allowed private hospital emergency rooms to turn away persons in need of emergency treatment without risking liability.[7] After a brief discussion of the common law duty to aid one in peril and the traditional rule of nonliability in hospital emergency room refusal cases, this comment will explore some of the expanding theories of hospital liability for refusing aid in emergency cases.

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[1]Editorial Notes, *The Potentials and Limitations of Emergency Medical Services*, 47 HOSPITALS, May 16, 1973, at 57.

[2]Trauma is synonymous with injury. Trauma or injury is produced by or results from the application of an external force or physical agent to the body as a whole or to one or more local areas of the body.

R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE ¶ 1.20 (1960). This comment also deals with emergency care required due to illness.

[3]Editorial Notes, *supra* note 1.

[4]*Id.* Another source reports that accidents cause 52 million injuries yearly. *Emergency Care: Hospitals and Communities Seek a Better Way to Handle a Nationwide Problem*, 120 MODERN HOSPITAL, Jan. 1973, at 31.

[5]Editorial Notes, *supra* note 1. Emergency room visits increased 366.6 percent from 1955 to 1971. *AHA research capsules — No. 11*, 47 HOSPITALS, Sept. 16, 1973, at 121. The percentage of emergency department visits are now increasing at the annual rate of 10 percent. Editorial Notes, *supra* note 1, at 58.

[6]Editorial Notes, *supra* note 1, at 57.

[7]*See, e.g.*, *Girl's Death Spurs Hospital Inquiry*, 109 MODERN HOSPITAL, Dec. 1967, at 42; Horty, *Emergency Treatment of Patient Exposes Hospital to Liability for His Care*, 119 MODERN HOSPITAL, Nov. 1972, at 66. *See also* Hill v. Ohio County, 468 S.W.2d 306 (Ct. App. Ky. 1971); Gold, *Emergency Room Medical Treatment: Right or Privilege?*, 36 ALBANY L. REV. 526, 527 (1972).

Public hospitals, on the other hand, have been held to a duty to provide such care. See note 81 *infra*.

I. The Common Law

"There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct . . . and passive in action [*sic*] . . . ."[8] Misfeasance is to act improperly while nonfeasance is to not act at all.[9] The common law imposed liability for misfeasance but not for nonfeasance. Thus no matter how morally outrageous the result, there was no duty imposed to aid another in peril.[10] The early common law courts found themselves too busy handling the growing number of cases of misfeasance to find time to impose liability for nonfeasance, even though serious harm or death may have resulted.[11] This distinction was based on a philosophy which held that the individual was capable of protecting himself if not interfered with[12]—an attitude of extreme individualism ingrained in Anglo-Saxon legal thought.[13] Even though this individualistic attitude appears to have died,[14] the distinction of liability for misfeasance and nonliability for nonfeasance remains.[15]

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[8]Bohlen, *The Moral Duty To Aid Others As A Basis of Tort Liability*, 56 U. Pa. L. Rev. 217, 219 (1908).

[9]*See, e.g.*, Stiewel v. Borman, 63 Ark. 30, 36, 37 S.W. 404, 405 (1896); Desmarais v. Wachusett Regional School Dist., 276 N.E.2d 691, 693 (Mass. 1971); Trum v. Town of Paxton, 329 Mass. 434, 438, 109 N.E.2d 116, 119 (1952).

A distinction between misfeasance and nonfeasance is not always easily made. Bohlen, *supra* note 8, at 220 n.6.

[10]*See, e.g.*, Slater v. Illinois Cent. R.R., 209 F. 480 (M.D. Tenn. 1911); Ficken v. Southern Cotton Oil Co., 40 Ga. App. 841, 151 S.E. 688 (1930); Allen v. Hixson, 111 Ga. 460, 36 S.E. 810 (1900); Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901); Union Pacific Ry. v. Cappier, 66 Kan. 649, 72 P. 281 (1903); O'Keefe v. W.J. Barry Co., 311 Mass. 517, 42 N.E.2d 267 (1942); Osterlind v. Hill, 263 Mass. 73, 160 N.E. 1128 (1907); Buch v. Amory Mfg. Co., 69 N.H. 257, 44 A. 809 (1898); Yania v. Bigan, 397 Pa. 316, 322, 155 A.2d 343, 346 (1959); Galicich v. Oregon Short Line R.R., 54 Wyo. 123, 145, 87 P.2d 27, 33 (1939).

[11]W. Prosser, Prosser on Torts § 56, at 338 (4th ed. 1971) [hereinafter cited as Prosser].

[12]*See* McNiece & Thornton, *Affirmative Duties in Tort*, 58 Yale L.J. 1272, 1288 (1949); Note, *The Failure to Rescue: A Comparative Study*, 52 Colum. L. Rev. 631, 632 (1952). The philosophy was also grounded on the reluctance to convert "the courts into an agency for forcing men to help one another." Prosser § 56, at 339.

[13]Bohlen, *supra* note 8, at 221.

[14]Note, *The Bad Samaritan: Rescue Reexamined*, 54 Geo. L.J. 629, 640 (1966). See *id.* at notes 56 through 60 for a list of social legislation which suggests modern man's interdependence.

[15]"The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." Restatement (Second) of Torts § 314 (1965). *See also* Weinfeld v. Kaplan, 282 N.Y. 348, 351, 26 N.E.2d 287, 288 (1940); Yania v. Bigan, 397 Pa. 316, 155 A.2d 343, 346 (1959).

Courts continue to recognize the lack of an affirmative duty to aid even though widely

The judicial response to the general rule of no duty to aid has not been to abrogate the rule but to carve out legal exceptions to it.[16] Liability for nonfeasance was first imposed in those cases involving defendants engaged in public callings who by holding themselves out to the public were regarded as having a duty to render service.[17] This exception has survived and is embodied in the present-day duty imposed on persons who are in a special relationship with a victim in need of aid.[18] The major example of this special relationship exception has been found in the relationship between a carrier and its passengers.[19] As the Mississippi Supreme Court put it in a 1906 case, "[i]t matters not how negligent a passenger may have been in producing the injury for which he sues, it does not absolve the railroad from the duty which it owes to him of proper attention after an accident shall have occurred . . . ."[20] A special relationship with an accompanying duty of affirmative action

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condemned by writers. *See, e.g.*, Ames, *Law and Morals*, 22 HARV. L. REV. 97, 113 (1908); Bohlen, *supra* note 8; McNiece & Thornton, *supra* note 12, at 1289; Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499 (1965); Seavy, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960). *But see, e.g.*, Minor, *The Moral Obligation as a Basis of Liability*, 9 VA. L. REV. 420 (1923); Note, *The Duty to Rescue*, 47 IND. L.J. 321, 332 (1972).

Twelve civil law countries have penal statutes imposing an affirmative duty to aid. See Note, *supra* note 14, at 635 n.37, for the countries and statutes. *See also* Rudolph, *supra* at 507-08.

Recently Vermont has enacted a broad duty to aid statute. VT. STAT. ANN. tit. 12, § 519 (1973). *See also* Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972). Many states have a statute imposing a duty to aid on motorists involved in accidents. *See, e.g.*, CAL. VEHICLE CODE § 20003 (West 1971). *See also* State v. Ray, 229 N.C. 40, 47 S.E.2d 494 (1948); Brumfield v. Wofford, 102 S.E.2d 103 (W. Va. 1958).

[16]Note, *The Duty to Rescue*, 47 IND. L.J. 321 (1972).

[17]PROSSER § 56, at 339.

[18]*See* RESTATEMENT (SECOND) OF TORTS § 314A (1965), which provides:

> (1) A common carrier is under a duty to its passengers to take reasonable action
>
> (a) to protect them against unreasonable risk of physical harm and,
>
> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> (2) An innkeeper is under a similar duty to his guests.
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
>
> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

[19]*See, e.g.*, Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326 (5th Cir. 1959); Endelman v. Palmer, 65 F. Supp. 436 (S.D.N.Y. 1946); Central of Ga. Ry. v. Madden, 135 Ga. 205, 69 S.E. 165 (1910); Vandalia R.R. v. Bryan, 60 Ind. App. 223, 110 N.E. 218 (1915); Searcy v. Interurban Transp. Co., 189 La. 183, 179 So. 75 (1938); Hughes v. Gregory Bus Lines, Inc., 157 Miss. 374, 128 So. 96 (1930); Kambour v. Boston & M.R.R., 77 N.H. 33, 86 A. 624 (1913); Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192 (1915).

[20]Yazoo & Miss. V.R.R. v. Byrd, 89 Miss. 308, 321, 42 So. 286, 288 (1906).

has also been found between an innkeeper and guest,[21] ship and crewman,[22] employer and employee,[23] shopkeeper and business visitor,[24] school and pupil,[25] husband and wife,[26] and host and business guest.[27]

An affirmative duty has been denied in some relationships. Thus, in Pennsylvania, no duty was found owing to an invitee, even though the defendant had enticed the invitee into jumping into the water in which he drowned.[28] The wide variance in the formation of special relation exceptions to the general rule of no affirmative duty "has resulted in much uncertainty as to whether any given case qualifies under an established exception or might result in a new exception."[29] It has been suggested that courts will find a special relationship and an accompanying affirmative duty whenever the defendant was in a position to have gained economic benefit from the relationship.[30]

An affirmative duty to act also has been imposed where the defendant has voluntarily undertaken to act and the plaintiff has relied detrimentally upon the defendant's undertaking, or the defendant has failed to exercise reasonable care in the conduct of his voluntary action, thereby increasing the plaintiff's risk of harm.[31] The most common

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[21]RESTATEMENT (SECOND) OF TORTS § 314A(2) (1965); *see, e.g.*, McKee v. Sheraton-Russell, Inc., 268 F.2d 669 (2d Cir. 1959); Dove v. Lowden, 47 F. Supp. 546 (W.D. Mo. 1942); Scholl v. Belcher, 63 Ore. 310, 127 P. 968 (1912).

[22]*See, e.g.*, Harris v. Pennsylvania R.R., 50 F.2d 866 (4th Cir. 1931); Salla v. Hellman, 7 F.2d 953 (S.D. Cal. 1925).

[23]RESTATEMENT (SECOND) OF TORTS § 314B (1965). *See also* Anderson v. Atchison, T. & S.F. Ry., 333 U.S. 821 (1948); Chicago Union Traction Co. v. Sawusch, 218 Ill. 130, 75 N.E. 797 (1905); Carey v. Davis, 190 Iowa 720, 180 N.W. 889 (1921); Hunicke v. Meramec Quarry Co., 262 Mo. 560, 172 S.W. 43 (1914); Welle v. Celluloid Co., 175 N.Y. 401, 67 N.E. 609 (1903).

[24]*See, e.g.*, L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942); Blizzard v. Fitzsimmons, 193 Miss. 484, 10 So. 2d 343 (1942).

[25]*See, e.g.*, Pirkle v. Oakdale Union Grammar School Dist., 40 Cal. 2d 207, 253 P.2d 1 (1953).

[26]*See, e.g.*, Territory v. Manton, 8 Mont. 95, 19 P. 387 (1888).

[27]Dupue v. Fleatau, 100 Minn. 299, 111 N.W. 1 (1907).

[28]Yania v. Bigan, 397 Pa. 316, 155 A.2d 343 (1959). The court found that the defendant had no duty to rescue the deceased from the water even though it was through the defendant's request that the deceased had entered the water. The deceased had come onto the defendant's land, a coal mining operation, for the purpose of discussing a business matter with the defendant. While there, the defendant asked the deceased to aid him in starting a pump located in a large flooded ditch. The deceased jumped from the side of the ditch into the water and drowned. The deceased's widow sued for wrongful death urging as one of her grounds of liability the defendant's failure to rescue the deceased from the water. As to this contention the court found that since the deceased contributed to the accident which caused his death, the defendant should not be held to answer for the consequences resulting from the accident. 155 A.2d at 346. *See also* Seavy, *I Am Not My Guest's Keeper*, 13 VAND. L. REV. 699 (1960).

[29]Note, *The Duty to Rescue*, 47 IND. L.J. 321 (1972).

[30]McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1282-87 (1949).

[31]*See* RESTATEMENT (SECOND) OF TORTS §§ 323-24A (1965). "The actor may have com-

example of this exception is found in railroad crossing cases where a railroad had performed a service and subsequently, without warning to the public, ceased to provide the service. Thus, where a railroad ceases to furnish a signalman which had been furnished regularly in the past, and where a passerby is injured by a passing train because of his reliance on the railroad's prior service, the railroad will be held liable for the injuries to the passerby.[32]

A third exception to the general rule of no affirmative duty to aid developed in cases where the defendant's action caused,[33] or created the possibility of causing,[34] the plaintiff to be harmed or put in a position of danger. The exception applies whether the plaintiff's original action is innocent or tortious.[35] Thus where player *A* drives a golfball and player *B* unexpectedly appears in the line of *A*'s drive, *A* is under a duty to warn *B*.[36] If *B* is injured, *A* is under a duty to protect him from further harm.[37]

II. Hospitals' Duty to Aid—Traditional View

As an extention of the common law rule of no affirmative duty to aid, the view arose that absent a statutory duty, a private hospital has no duty to serve everyone who applied for admission.[38] This view was

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mitted himself to the performance of an undertaking gratuitously or under contract, and so may have assumed a duty of reasonable care for the protection of the other . . . ." *Id.* § 314, comment *a* at 116. *See also* Seavy, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 Harv. L. Rev. 913, 919 (1951).

[32]*See, e.g.*, Erie R.R. v. Stewart, 40 F.2d 855 (6th Cir. 1930); Will v. Southern Pac. Co., 18 Cal. 2d 468, 116 P.2d 44 (1941); Mallet v. Southern Pac. Co., 20 Cal. App. 2d 500, 68 P.2d 281 (Dist. Ct. App. 1937); Langston v. Chicago & N.W. Ry., 398 Ill. 248, 75 N.E.2d 363 (1947); Ray v. Hines, 118 Wash. 530, 203 P. 929 (1922); Bluhm v. Bryam, 193 Wis. 346, 214 N.W. 364 (1927).

[33]Restatement (Second) of Torts § 322 (1965). *See, e.g.*, cases cited *id.* Appendix § 322. *See also* Southern Ry. v. Sewell, 18 Ga. App. 544, 90 S.E. 94, 99 (1916).

[34]Restatement (Second) of Torts § 321 (1965). *See, e.g.*, cases cited *id.* Appendix §321. *See also* Hardy v. Brooks, 103 Ga. App. 124, 118 S.E.2d 492 (1961); Simonsen v. Thorin, 120 Neb. 684, 234 N.W. 628 (1931).

[35]Restatement (Second) of Torts § 321, comment *a* at 116 (1965).

[36]*Id.* at Illustration 1.

[37]Thus where *B* is hit by *A*'s golf ball and is rendered unconscious and suffers exposure due to *A*'s failure to remove him from the weather, *A* is liable for the damage done to *B* from exposure even if he is not liable for the damage done to *B* by the golf ball. *Cf. id.* §322, Illustrations 1-3.

[38]*See, e.g.*, Le Juene Road Hosp., Inc. v. Watson, 171 So. 2d 202 (Fla. Ct. App. 1965).

> [A] private hospital is under no obligation to admit any patient that it does not desire. Harsh as this rule may sound, it is permissible for a private hospital to reject for whatever reason, or no reason at all, any applicant for medical and hospital services.

Id. at 203 (citations omitted).

often expressed in the dicta of cases which held that a hospital is under no duty to admit to its staff every qualified physician who applies for a position.[39] These "doctor-staff" cases held that "a private hospital is not under a common law duty to serve everyone who applie[s] for treatment or permission to serve."[40] This reasoning was analogous to the rule that a physician has no duty to serve everyone who seeks his aid.[41]

The case most often cited in favor of allowing a hospital freedom in choosing to render aid is *Birmingham Baptist Hospital v. Crews*.[42] In this case the plaintiff carried his 2½-year-old daughter to Birmingham Baptist Hospital to receive treatment for an illness. At the hospital the daughter's illness was diagnosed as diphtheria. The house doctor swabbed the girl's throat and administered an antitoxin. After this initial treatment the hospital told Crews his daughter could not be admitted since it was against the hospital's policy to accept patients with contagious diseases. Crews took his daughter home where she died a short time later. The Alabama Supreme Court reversed a verdict for the plaintiff holding that the defendant as a "private corporation, and not a public institution, owe[d] the public no duty to accept any patient not desired by it."[43] The court went on to say that it was unnecessary even for the hospital to assign a reason for its refusal to accept an applicant. Though *Crews* is cited as authority for refusing aid in emergency situations,[44] the court actually found that the hospital had rendered all possible emergency treatment;[45] therefore, the case is authority only for the proposition that a hospital has no duty to accept applicants as in-patients.

This line of reasoning was followed more recently in a 1971 Kentucky case, *Hill v. Ohio County*,[46] where a hospital refused to admit a woman about to give birth. As a result of the hospital's refusal, the child was born at home without proper medical care. The mother subse-

[39]Olander v. Johnson, 258 Ill. App. 89 (1930); Natale v. Sisters of Mercy, 243 Iowa 582, 52 N.W.2d 701 (1952); Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298 (1946); McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 21 Am. R. 529 (1876); Van Camper v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y.S. 554 (1924), *aff'd*, 239 N.Y. 615, 147 N.E. 219 (1925).

[40]Levin v. Sinai Hosp., 186 Md. 174, 46 A.2d 298, 301 (1946).

[41]Powers, *Hospital Emergency Services & the Open Door*, 66 MICH. L. REV. 1455, 1480 (1968). A physician has no duty to accept a patient. *See, e. g.*, Findlay v. Board of Supervisors, 72 Ariz. 58, 230 P.2d 526 (1951); Buttersworth v. Swint, 53 Ga. App. 602, 186 S.E. 770 (1936); Hurley v. Eddingfield, 156 Ind. 416, 59 N.E. 1058 (1901).

[42]229 Ala. 398, 157 So. 224 (1934).

[43]157 So. at 225.

[44]Powers, *supra* note 41, at 1459 n.27.

[45]157 So. at 225. "[T]he treatment given was but an emergency treatment as the only hope in a desperate situation . . . ."

[46]468 S.W.2d 306 (Ky. Ct. App. 1971), *cert. denied*, 404 U.S. 1041 (1972).

quently died. In affirming the trial court's summary judgment for the hospital, the appeals court held "that no breach of duty by the hospital occurred."[47]

III. Hospitals' Duty to Aid — Contemporary Views

A. Undertaking and Implied Admission

One method by which courts have found liability for a hospital's refusal to render aid in emergency cases is by finding that, despite the subsequent refusal to fully treat an applicant, the hospital had already begun to render aid to the injured party, thereby committing itself to assume responsibility for the applicant's well-being.[48] Once the hospital has voluntarily undertaken to render services to an applicant, it is not free to discontinue its services if the applicant has relied on the undertaking, thereby increasing his risk of harm.[49] Risk of harm to an applicant is increased whenever a hospital originally assumes control over an applicant and subsequently refuses to give him emergency aid, or negligently gives him aid, thus delaying the proper treatment he could have received from another source.[50] Thus courts wanting to circumvent the no-duty-to-aid rule in order to impose liability on the hospital are quick to find an undertaking to aid an injured party.[51]

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[47]468 S.W.2d at 309.

[48]*See, e.g.*, Bourgeois v. Dade County, 99 So. 2d 575, 576 (Fla. 1957) (superficial clincial examination); New Biloxi Hosp., Inc. v. Frazier, 245 Miss. 185, 197-98, 146 So. 2d 882, 887 (1962) (lying in emergency room 2 hours); O'Neill v. Montefiore Hosp., 11 App. Div. 2d 132, 202 N.Y.S.2d 436, 440 (1960) (phone call to doctor); Methodist Hosp. v. Ball, 50 Tenn. App. 460, 362 S.W.2d 475, 477 (1961) (lying in emergency room 45 minutes). *See also* text accompanying note 31 *supra*.

[49]One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965). *See also* text accompanying notes 31 & 32 *supra*.

[50]Where . . . the actor's assistance has put the other in a worse position than he was before [because he] has been induced to forego other opportunities of obtaining assistance, the actor is not free to discontinue his services . . . .

Restatement (Second) of Torts § 323, comment *c* (1965).

[51]*See, e.g.*, Bourgeois v. Dade County, 99 So. 2d 575 (Fla. 1957) (superficial clinical examination); New Biloxi Hosp., Inc. v. Frazier, 245 Miss. 185, 146 So. 2d 882 (1962) (2 hours waiting in emergency room); O'Neill v. Montefiore Hosp., 11 App. Div. 2d 132, 202 N.Y.S.2d 436 (1960) (nurse's phone call to doctor); Jones v. City of New York, 134 N.Y.S.2d 779 (Sup. Ct. 1954), *modified*, 143 N.Y.S.2d 628 (App. Div. 1955) (cleaned and

In cases where the courts have found an undertaking to aid an applicant, they usually support their imposition of liability with a finding that the hospital had impliedly admitted the injured party, thereby forming a hospital-patient relationship.[52] The courts rarely specify the actions necessary to establish the hospital-patient relationship; however, once the hospital has sufficiently acted upon the applicant to "impliedly admit" him, thereby changing his status from applicant to patient, the relationship between the hospital and applicant becomes "special,"[53] and the hospital is under an affirmative duty to fully treat him.[54] Thus the hospital may be found liable on one or both of two theories: (1) for failure to render complete aid to the applicant when it had undertaken to aid him but had discontinued treatment, thereby increasing the risk of harm to the injured party; and (2) for impliedly entering into a special hospital-patient relationship with the injured party and breaching the duties imposed by that relationship.[55]

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dressed wound); Methodist Hosp. v. Ball, 50 Tenn. App. 460, 362 S.W.2d 475 (1961) (45 minutes waiting in emergency room).

The most extreme example of an undertaking to aid may be *O'Neill v. Montefiore Hospital, supra*, where the court remanded the case to determine if a nurse's phone call to a doctor in behalf of a heart attack victim was an undertaking to aid. The heart attack victim had come to the defendant hospital seeking aid but the nurse on duty at the emergency room refused assistance since the hospital did not handle the type of insurance plan (H.I.P.) owned by the victim. The nurse made no examination of the victim but did offer to telephone an H.I.P. doctor. After she reached the doctor she had the victim himself describe his symptoms over the phone. When the doctor told the victim to come back when an H.I.P. clinic was open, the victim again requested assistance from the emergency room nurse. Again the nurse refused. The victim died a short time after returning to his apartment. The trial court dismissed the case against the hospital at the end of the plaintiff's case. The appellate court remanded the case for a jury determination of whether the nurse by her actions had undertaken to provide medical services for the deceased. *Id.* at 440. Rather than retry the case the hospital paid $45,000 in settlement. *Professional Negligence in Hospital Emergency Rooms*, 208 J.A.M.A. 231, 232 (1969).

[52]*See, e.g.*, New Biloxi Hosp., Inc. v. Frazier, 245 Miss. 185, 195, 146 So. 2d 882, 886 (1962); Methodist Hosp. v. Ball, 59 Tenn. App. 460, 362 S.W.2d 475, 479 (1961).

[53]The hospital-patient relationship is excepted from the no-duty-to-aid rule under the "special relationship" doctrine. *See* text accompanying notes 16 through 30 *supra*.

[54]"The degree of care exacted of a hospital toward its patients is such reasonable care and attention for their safety as their mental and physical condition, if known, may require." New Biloxi Hosp., Inc. v. Frazier, 245 Miss. 185, 196, 146 So. 2d 882, 887 (1962).

[55]Any situation in which a person . . . comes to an emergency room of a hospital which institution holds itself out to the community in which it is located as a facility for emergency room care and where that individual is permitted to sit beyond a matter of a couple of minutes, is asked his name and address, it is filled out on a form and he is told to wait, constitutes an emergency situation. This constitutes a relationship which has been undertaken between that institution and patient because at that point in time he is already a patient.

Welch, *Mishandling Medical Emergencies*, in AMERICAN TRIAL LAWYERS ASSOCIATION, 1970 CONVENTION PROCEEDINGS 239, 243 (1971).

A case which illustrates this second theory is *New Biloxi Hospital, Inc. v. Frazier*, [56] a 1962 Mississippi case, in which Frazier, while bleeding from a gunshot wound in the arm, was taken by ambulance to the New Biloxi Hospital. Frazier had bled considerably at the scene of the shooting and during the trip to the hospital. Upon his arrival at the hospital emergency room Frazier was still bleeding profusely but was ignored by the nurses on duty. He lay waiting on the ambulance cot for 20 minutes while a 24 to 30 inch diameter puddle of blood formed on the floor beneath him. Finally, after insistence by the ambulance drivers, Frazier was transfered from the cot to a table in the emergency room. The registered nurse in charge took Frazier's blood pressure and pulse but made no attempt to stop the bleeding. She then contacted a doctor on call who arrived a short time later. The doctor, uninformed of the severe bleeding, left to arrange Frazier's transfer to a Veterans' Administration Hospital. Frazier began exhibiting outward symptoms of shock, but nevertheless received no aid from the emergency room nurses. When Frazier finally was transfered he was near death. He died shortly after arriving at the veterans' hospital from hemorrhage with resulting shock.

The Mississippi Supreme Court ruled that Frazier was a patient,[57] and that the degree of care owed by a hospital to its patients "is such reasonable care and attention for their safety as their mental and physical condition . . . may require."[58] Other than noting that Frazier had been recorded as an emergency-room patient and that he had remained in the emergency room for 2 hours, the court did not discuss how Frazier came into the hospital-patient relationship. In addition to finding that Frazier was a patient, the court found that the hospital had undertaken to render emergency medical service to Frazier, and that "[u]nder such circumstances, the hospital and its employees had a duty to use reasonable care in protecting [Frazier's] life and well being."[59]

Another case with a similar fact situation and result is *Methodist Hospital v. Ball*.[60] In this 1961 Tennessee case, the plaintiff's son was taken to the defendant hospital for emergency care arising out of an automobile accident. The boy was allowed to lie unattended on a stretcher in the emergency room for 45 minutes. At that time the intern in charge of the emergency room ordered the ambulance driver to take the boy to another hospital where he died a short time later from a lacerated liver. The trial resulted in a verdict for the plaintiff. The hospital appealed, denying that the deceased had ever been admitted

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[56]245 Miss. 185, 146 So. 2d 882 (1962).

[57]*Id.* at 195, 146 So. 2d at 886.

[58]*Id.* at 196, 146 So. 2d at 887.

[59]*Id.*

[60]50 Tenn. App. 460, 362 S.W.2d 475 (1961).

to the hospital and contending that it had not breached any duty owed to the plaintiff's son. Like the *Frazier* court, the *Ball* court found that the deceased had become a patient. The court held that the boy "was a patient even though he was never given a room in the hospital and had stayed in the emergency room only forty-five minutes . . . ."[61] As in *Frazier*, the court never faced the question of how or when the boy became admitted.

The standard for determining when the plaintiff enters into the hospital-patient relationship was discussed in *LeJuene Road Hospital, Inc. v. Watson*,[62] a 1965 Florida case. An 11-year-old boy was taken to the defendant hospital for an appendectomy pursuant to advice from the boy's physician. At the hospital the boy was taken to the examining room, undressed, examined and given medication. Two hours later the boy was required to leave the hospital due to the mother's inability to produce $200 cash. The court, in affirming a verdict for the plaintiff, noted that the "question of what acts constitute an admission to a hospital must vary with the circumstances."[63]

The court rejected the hospital's contentions that admission to the hospital was determined by whether the proper forms had been filled out, and that since the plaintiff's forms had not yet been filled out, no formal admission had taken place. The court noted that the filling out of forms could not be a proper criterion for determining admission, and found that the boy had been admitted because "the hospital had initiated care and treatment of [the] patient and had taken further steps than those necessary to determine whether or not they were going to admit him."[64]

The problem with the "undertaking to aid" and "implied admission" lines of reasoning is that they depend upon specific action on the part of the hospital which can be found by the court to be an undertaking to aid or an implied admission. Because of the requirement of an act on the part of the hospital, courts must often resort to extreme fictional devices in order to impose liability.[65]

Another criticism which can be leveled at these two theories of liability is their limited scope of application. Courts can extend fictional devices only so far. If a hospital refuses to allow the injured party even to enter the door, the "undertaking" rationale is defeated at the outset. A court cannot reasonably hold a hospital responsible for an act of commitment when there has been no act at all. Thus, a hospital which

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[61]362 S.W.2d at 479.

[62]171 So. 2d 202 (Fla. Ct. App. 1965).

[63]*Id.* at 203.

[64]*Id.*

[65]See the discussion of *O'Neill v. Montefiore Hospital* and the cases cited in note 51 *supra*.

"slams the door" in the applicant's face is free from liability, while a hospital which undertakes to give minimal aid to an applicant, but refuses to render full treatment, is held legally responsible for the consequences.

Extensive use by the courts of fictional "undertaking" or "implied admission" theories of liability could lead to equally fictional and detrimental behavior on the part of hospitals. In order to protect their legitimate interest in treating patients who are able to pay, hospitals could resort to severe and expedient methods of determining which applicants are good credit risks. By increasing the speed and accuracy of admission procedures, hospitals could develop highly efficient and arbitrary door-slamming techniques through which no court could find an undertaking to aid.

B. Unmistakable Emergency and Well-Established Custom

In *Wilmington General Hospital v. Manlove*,[66] the Delaware Supreme Court went a step further than the *Frazier-Ball* rationale of "undertaking" and "implied admission." In *Manlove* the plaintiff's 4-month-old infant son developed diarrhea. The parents consulted the family physician, Dr. Hershon, who confirmed that the child could be treated with a medicine the Manloves had on hand. That evening, with the child's temperature rising higher than normal, the Manloves again contacted Dr. Hershon and were prescribed an additional medication. That night the baby did not sleep and the next morning the child was taken to Dr. Hershon's office. Dr. Thomas, a colleague, examined the child, treated him for a sore throat and diarrhea, and prescribed additional medication. That night the baby again did not sleep. The following morning the Manloves, knowing that Dr. Hershon's office was closed, took the child to the emergency ward of the defendant Wilmington General Hospital. At the hospital the parents explained the circumstances of the child's illness to the nurse on duty in the reception room of the emergency ward. The nurse told the parents that the hospital could not treat the child since he was already under the care of a physician and that there would be a danger of conflicting medications. The nurse was unable to reach Dr. Hershon or Dr. Thomas at their office. At no time did the nurse rise from her chair. She did not examine the child, take his temperature, feel his forehead, or look down his throat. The Manloves returned home and made an appointment to see

[66] 54 Del. 15, 174 A.2d 135, *aff'g on other grounds*, 53 Del. 338, 169 A.2d 18 (Super. Ct. 1961). Though this case is a logical extension of the *Frazier-Ball* rationale, it should be noted that it was decided prior to the *Frazier* and *Ball* cases discussed at text accompanying notes 56 through 61 *supra*.

either Dr. Hershon or Dr. Thomas that night. At approximately 3 o'clock that afternoon the baby died of bronchial pneumonia.

The parents brought an action against the hospital to recover damages for wrongful death charging negligence in the hospital's failure to render emergency assistance. The hospital answered denying negligence and moved for a summary judgment. The trial court's denial of the hospital's motion for a summary judgment[67] was appealed. On appeal, the Delaware Supreme Court found that one of the issues at trial was "[w]hether the hospital was under any duty to furnish medical treatment to any applicant for it, even in an emergency . . . ."[68] The court found that the defendant was a private hospital which owed the public no duty to accept any patient.[69] The court then examined whether an emergency situation was an exception to the no-duty-to-aid rule. Specifically, the court stated:

> It may be conceded that a private hospital is under no legal obligation to the public to maintain an emergency ward, or, for that matter a public clinic.
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> But the maintenance of such a ward to render first aid to injured persons has become a well-established adjunct to the main business of a hospital. If a person, seriously hurt, applies for such aid at an emergency ward, relying on the established custom to render it, is it still the right of the hospital to turn him away without any reason? In such a case, it seems to us, such a refusal might well result in worsening the condition of the injured person, because of time lost in a useless attempt to obtain medical aid.
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> Such a set of circumstances is analogous to the case of the negligent termination of gratuitous services, which creates a tort liability.[70]

The court went on to find that a hospital would be liable for refusal of service to an applicant for emergency care in the case of an *unmistakable emergency* if the applicant had relied upon a *well-established custom* of the hospital to render aid in emergency cases.[71] The court then remanded the case to determine whether there was an unmistakable emergency.

A case which has followed the *Manlove* rationale is *Stanturf v. Sipes*.[72] In this 1969 Missouri case, Stanturf's feet had frozen from spending the night in his car in zero-degree weather. Stanturf was examined by Dr. Duffy, who attempted to obtain Stanturf's admission

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[67]53 Del. 338, 169 A.2d 18 (Super. Ct. 1961). *See* text accompanying notes 82 through 86 *infra*.

[68]174 A.2d at 137.

[69]*Id.* at 138. The lower court found that the hospital was a quasi-public entity and as such had a duty to accept all emergency applicants. *See* Part III. *C. infra*.

[70]174 A.2d at 139.

[71]*Id.* at 140.

[72]447 S.W.2d 558 (Mo. Sup. Ct. 1969).

to the defendant Wright Memorial Hospital. After days of futile effort, however, Dr. Duffy gave up and obtained Stanturf's admission to an out-of-state hospital where both of his feet had to be amputated. Stanturf sued for compensatory and punitive damages. The trial court entered a summary judgment for the hospital. On review, the Missouri Supreme Court adopted the rationale of the *Manlove* decision and reversed and remanded for a jury trial.[73] The court found that taking all the plaintiff's evidence as true, it was possible for a jury to find that the plaintiff's condition created an "unmistakable emergency" and that the hospital had a "well-established custom" to admit any applicant upon the payment of a $25 admission fee (which had been tendered).[74] The court also reasoned that the jury could have found that the plaintiff's condition was worsened by the delay resulting from the futile efforts of Dr. Duffy to obtain treatment from the hospital.[75]

In the *Manlove* and *Stanturf* cases the courts found that the hospitals had taken no specific action towards the plaintiffs which would indicate an assumption of the responsibility to treat. What the courts did find was that the plaintiffs had relied on the hospitals' well-established customs of treating emergency applicants. The courts' decisions can be explained as an extension of the reliance aspect of the *Frazier-Ball* rationale; *i.e.*, under *Manlove*, a hospital may be held liable where an applicant relied on the hospital's mere *custom* to aid in all cases[76] rather than its undertaking to aid in a particular case.[77]

By basing liability on reliance upon a well-established custom to aid, the courts have avoided the frequently difficult problem of basing liability upon an affirmative act by the hospital.[78] The courts, however, have left themselves the problem of defining a "well-established custom" of aiding those in need of emergency care. Moreover, the courts

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[73]*Id.* at 562.

[74]*Id.*

[75]*Id.*

[76]*Cf.* railroad cases cited note 32 *supra*.

[77]The courts' holdings may also be explained by another line of reasoning. The courts could have found that a hospital's holding itself out as a place for emergency aid (well-established custom) constituted an *undertaking* to aid anyone who relied on the hospital's reputation. The two decisions would then fit within the *Frazier-Ball* rationale of liability for reliance on an undertaking to aid. *See* text accompanying notes 49 through 50 *supra*. RESTATEMENT (SECOND) OF TORTS § 323(b) (1965) states:

> One who undertakes . . . to render services to another . . . is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
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> . . . .
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> (b) the harm is suffered because of the other's reliance upon the undertaking.

[78]*See, e.g.*, the discussion of the *O'Neill* case in note 51 *supra*.

have left undecided the situations where there is no well-established custom of treating emergency applicants, or where there is a well-established custom but the applicant had not relied upon the custom.[79]

C. *Quasi-Public Entity*

Another theory of liability, which thus far has been asserted unsuccessfully, is to classify a private hospital as a quasi-public entity.[80] Classification as a quasi-public entity imposes the same duty of providing emergency care on private hospitals as is imposed on public hospitals.[81] In the lower court treatment of the *Manlove* case,[82] the hospital's motion for a summary judgment was denied upon a finding by the trial court that the hospital was a quasi-public entity.[83] The lower court based its finding upon the fact that the hospital had received tax exemptions and direct state subsidies,[84] thereby assuming an implied duty to serve all members of the public needing emergency medical care.[85]

Although the classification as a quasi-public entity was rejected by the Delaware Supreme Court,[86] and has traditionally been rejected in cases concerning private hospitals,[87] the doctrine of quasi-public entities has been expanded in recent state and federal cases in other areas of the law.[88] Other jurisdictions could adopt this doctrine as a viable rationale

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[79]Neither the *Manlove* nor the *Stanturf* court discussed the degree of reliance necessary to bring about liability. In *Manlove* the court did not discuss whether the plaintiff had relied on the hospital's reputation in bringing his son to its emergency room, nor did the court pose this as a question to be answered on remand. Obviously, if a person seeks emergency care at a hospital he is relying on the hospital to give him such care. The *Manlove* test, however, was more than just reliance on the hospital to give care; it was reliance on the hospital's well-established *custom* to give care.

[80]Wilmington Gen. Hosp. v. Manlove, 53 Del. 338, 169 A.2d 18 (Super. Ct.), *aff'd on other grounds*, 54 Del. 15, 174 A.2d 135 (1961).

[81]Williams v. Hospital Authority, 119 Ga. App. 626, 168 S.E.2d 336 (1969) (public hospital supported by public tax funds which does maintain emergency facilities for the general public cannot arbitrarily refuse its facilities to a member of the public obviously in need of treatment).

[82]Wilmington Gen. Hosp. v. Manlove, 53 Del. 338, 169 A.2d 18 (Super. Ct.), *aff'd on other grounds*, 54 Del. 15, 174 A.2d 135 (1961).

[83]169 A.2d at 21-22.

[84]*Id.* at 21.

[85]*Id.* at 22.

[86]174 A.2d at 137.

[87]*See, e.g.*, West Coast Hosp. Ass'n v. Hoare, 64 So. 2d 293 (Fla. 1953); Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y.S. 554, *aff'd*, 239 N.Y. 615, 147 N.E. 219 (1925).

[88]*Cf., e.g.*, Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963). These cases dealt with the imposition of federal standards regarding racial discrimination where the hospitals involved were partially supported by federal funds.

to establish a duty to render emergency medical service. Acceptance of such a rationale would significantly expand the duty of hospitals to provide emergency medical services.[89] No longer would liability have to be prefaced on a finding of reliance, as in the *Manlove* appellate case, or implied admission and assumption of duty, as in *Frazier*. Acceptance of a quasi-public entity rationale, however, would create as many problems as it would solve. If the hospital were treated as a quasi-public entity for purposes of determining emergency room liability, it would necessarily follow that the quasi-public classification would apply to all questions concerning hospital rights, duties, and liabilities. This would create substantial and unnecessary upheaval in all areas of established hospital law.[90] Therefore, the quasi-public entity theory does not appear to be a wise method of imposing liability in hospital emergency room refusal cases.

D. Statutory Duty

Five states have required by statute that all hospitals, both public and private, give aid to persons in need of emergency care.[91] Illinois, one of the five, enacted its statute in 1927. The statute in its present form provides:

> Every hospital required to be licensed by the Department of Public Health, . . . which provides general medical and surgical hospital services shall provide a hospital emergency service in accordance with rules and regulations adopted by the Department of Public Health and

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[89]Since most hospitals receive some state or federal subsidies, or tax exemptions, most hospitals could be classified as quasi-public entities. Comment, *Must A Private Hospital Be a Good Samaritan?*, 18 U. FLA. REV. 475, 481-82 (1965); *see, e.g.*, 42 U.S.C. § 291 (1970).

[90][T]he holding that the receipt of grants of public money requires the hospital to care for emergency cases, as distinguished from others, is not logical . . . . If the holding is sound it must apply to all the hospital services, and that conclusion . . . is clearly unsound.

Wilmington Gen. Hosp. v. Manlove, 54 Del. 15, 174 A.2d 135, 138 (1961). "[T]he public utility theory would create conceptual difficulties in the application of other rules of hospital law . . . ." *Hospital Emergency Services & the Open Door*, 66 MICH. L. REV. 1455, 1483 (1968).

[91]CAL. HEALTH & SAFETY CODE § 1345 (West Supp. 1973); FLA. STAT. ANN. § 401.45 (Supp. 1974); ILL. ANN. STAT. ch. 111½, § 86 (Smith-Hurd Supp. 1974); N.Y. PUB. HEALTH LAW § 2805-b (McKinney Supp. 1973); TENN. CODE ANN. § 53-5201 (Supp. 1973).

In addition to these five states, Vermont has a statute which creates a general duty on the part of all persons to aid anyone in need of help.

> A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

VT. STAT. ANN. tit. 12, § 519(a) (1973). *See also* Franklin, *Vermont Requires Rescue: A Comment*, 25 STAN. L. REV. 51 (1972).

> shall furnish such hospital emergency services to any applicant who applies for the same in case of injury or acute medical condition where the same is liable to cause death or severe injury or serious illness.[92]

Violation of the Illinois statute constitutes a petty offense,[93] punishable by a fine of up to $500.[94] In 1972, Tennessee adopted a similar statute,[95] the violation of which constitutes a misdemeanor punishable by a fine up to $1,000.[96]

California enacted a statute in 1968 requiring hospitals to provide emergency services to all persons requesting such services:

> Emergency services and care shall be provided to any person requesting such services or care, or for whom such services or care is requested, for any condition in which the person is in danger of loss of life, or serious injury or illness, at any hospital licensed under this chapter that maintains and operates an emergency department to provide emergency services to the public when such hospital has appropriate facilities and qualified personnel available to provide such services or care.
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> Neither the hospital, its employees, nor any physician, dentist, or podiatrist shall be held liable in any action arising out of a refusal to render emergency services or care if reasonable care is exercised in determining the condition of the person, or in determining the appropriateness of the facilities, the qualifications and availability of personnel to render such services.[97]

Violation of the California statute is a misdemeanor subject to fine of up to $500.[98]

In 1969, New York enacted a general state statute which provides that:

> Every general hospital shall admit any person who is in need of immediate hospitalization with all convenient speed and shall not be-

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[92]ILL. ANN. STAT. ch. 111 ½, § 86 (Smith-Hurd Supp. 1974).

[93]*Id.* § 87.

[94]*Id.* ch. 38, § 1005-9-1(a)(3) (Smith-Hurd 1973).

[95]TENN. CODE ANN. § 53-5201 (Supp. 1973).

> Every hospital, either public or private, which does business within this state and provides general medical and surgical services shall provide a hospital emergency service in accordance with rules and regulations adopted by the hospital licensing board of the department of public health and shall furnish such hospital emergency services to any applicant who applies for the same in case of injury or acute medical condition where the same is liable to cause death or severe injury or illness.

[96]*Id.* § 53-5203.

[97]CAL. HEALTH & SAFETY CODE § 1345 (West Supp. 1973).

[98]*Id.* § 1350.

> fore admission question the patient . . . concerning insurance, credit or payment . . . .[99]

In 1973, the legislature added a section which provided that in cities with a population of one million or more, "a general hospital must provide emergency medical care and treatment to all persons in need of such care and treatment and applying to such hospital therefor."[100]

Florida enacted a statute in 1973 which requires all hospitals with emergency departments to provide emergency medical treatment:

> No person shall be denied treatment for any emergency medical condition which will deteriorate from a failure to provide such treatment at any hospital . . . that operates an emergency department providing emergency treatment to the public.[101]

Violation of the Florida statute constitutes a misdemeanor of the second degree.[102] Conviction may result in imprisonment up to 60 days and a fine up to $500.[103]

Since each of these five statutes provides for criminal sanctions if violated, they each could serve as the basis for a civil suit.[104] "When a statute provides that under certain circumstances particular acts shall . . . be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligent to deviate."[105] Statutes imposing duties upon hospitals to aid emergency applicants can be analogized to penal statutes imposing similar duties on drivers involved in automobile accidents. A driver involved in an automobile accident has a statutorily imposed duty in most jurisdictions to help others injured in the accident.[106] Courts have created civil liabilities for breaching the duties imposed by "leaving the scene of an accident" statutes.[107] Courts could likewise impose liability for breaching a statute imposing duties

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[99]N.Y. PUB. HEALTH LAW § 2805-b(1) (McKinney Supp. 1973).

[100]*Id.* § 2805-b(2).

[101]FLA. STAT. ANN. § 401.45 (Supp. 1974). This section is applicable to all hospitals licensed under chapter 395 of the 1973 Florida statutes, which includes all private and governmental hospitals. *Id.* § 395.03.

[102]*Id.* § 401.41.

[103]*Id.* §§ 775.082-.083.

[104]*See* notes 89, 91, 93, 95, 97 *supra*.

There are no reported cases in the five jurisdictions which have used the penal statutes as a basis for civil liability.

[105]PROSSER § 36, at 190. "The fact that such legislation is usually penal in character, and carries with it a ciminal penalty, will not prevent its use in imposing civil liability . . . ." *Id.*

[106]*See, e.g.*, MISS. CODE ANN. § 63-3-405 (1972), which provides:

> The driver of any vehicle involved in an accident . . . shall render to any person injured in such accident reasonable assistance, including the carrying, or the making arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

Violation of this section constitutes a misdemeanor. *Id.* § 63-3-201.

on hospitals to render emergency medical care. Courts, however, will not look to a criminal statute for a standard of conduct unless the plaintiff is in the class of persons which the statute is designed to protect,[108] and the harm suffered was of the kind which the statute was intended to prevent.[109] Since these five statutes were designed to protect any person in need of emergency aid from the harm of not receiving that aid, courts could very well look to these statutes to find a duty of care required of hospitals in emergency situations.

Although penal statutes in this area serve both the state's interest in promoting public health and as a basis for civil liability in favor of the injured party, the most direct route to ensuring full redress to the applicant would be to enact statutes imposing both criminal and civil liabilities. This would avoid any necessity on the part of courts to resort to indirect and cumbersome devices.

IV. Conclusion

While there are some exceptions, it has become clear that modern courts will hold hospitals responsible for providing emergency room medical services. Whether by the *Manlove* "well-established custom" doctrine, the *Frazier* "assumption of duty" and "implied admission" rationales, or the "quasi-public entity" doctrine, courts are going to find some method of avoiding the no-duty-to-aid rule in emergency room cases. Five jurisdictions have faced this problem and have enacted penal statutes which require hospitals to provide emergency medical services. Model acts for emergency medical programs[110] have imposed on hospitals a duty to treat, and at least one jurisdiction has required all persons to aid others in emergency situations.[111] The best solution to the emergency room situation is to impose a statutory duty on hospitals rather than forcing courts to go to extremes to find an exception to the common law no-duty-to-aid rule.

A number of objections to the statutory imposition of a duty to aid have been voiced,[112] but none seem applicable to the emergency room

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[107]*See, e.g.*, Brooks v. E.J. Willig Transp. Co., 40 Cal. 2d 669, 255 P.2d 802, 808-09 (1953), where the court, after noting that the California Vehicle Code required an automobile driver who was in an accident to stop and render aid, held that "[t]his duty is imposed upon the driver whether or not he is responsible for the accident, and a violation gives rise to civil liability if it is a proximate cause of further injury or death." *See also* Annot., 80 A.L.R.2d 299, § 3 (1961).

[108]Prosser § 36, at 192-95.

[109]*Id.* at 195-97.

[110]*See, e.g., Model Act for Emergency Medical Services*, in Public Health Service, Department of Health, Education & Welfare, Pub. No. H.S.M. 72-2017, State Statutes on Emergency Medical Services (1972).

[111]*See* note 91 *supra*.

[112]Gorden, *Moral Challenge to the Legal Doctrine of Rescue*, 14 Clev.-Mar. L. Rev. 334, 350 (1965).

situation. One such objection has been that if several persons witness the peril there is no way to determine which would be liable.[113] This objection obviously would not be applicable to the emergency room situation since the specific hospital involved would be the only "witness" falling under the statutorily imposed duty to aid. A second objection to statutorily imposing a duty to aid is that it would be a form of slavery to force one man to serve another and would run counter to our Anglo-American individualistic tradition.[114] Society, however, has often imposed duties on individuals where the benefit to others is sufficient justification.[115] Surely a balancing test would weigh heavily towards imposing a duty in emergency room situations, especially since most hospitals are not individuals but are corporate or governmental entities.

A final argument often raised is that the law should not enforce unselfishness.[116] In view of modern society's interdependence and demands, this argument no longer seems valid. As stated by one early writer:

> [I]t should not be forgotten that a system of law which lags too far behind the universally received conceptions of abstract justice, in the end must lose the sympathy, the confidence, perhaps even the respect of the community.[117]

Charles Gregory Copeland

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[113]*Id.*

[114]*Id.*

[115]*See* Comment, *Good Samaritans and Liability for Medical Malpractice*, 64 COLUM. L. REV. 1301, 1320 (1964).

[116]Gorden, *supra* note 112.

[117]Bohlen, *supra* note 8, at 337.

THE LIABILITY OF THE PRODUCT ENDORSER

I. Introduction

The role of the product endorser[1] is quickly becoming an integral part of the advertising and marketing of goods.[2] As the need for higher quality products increases, manufacturers are using endorsers' certification marks to increase consumer demand for their products, because both consumers and manufacturers[3] rely on certification marks in product selection.[4] As more consumers rely on product certification, a question arises: Who should bear the risk for faulty or negligent certification, the manufacturer, the endorser, or the consumer? Despite some case law imposing liability upon the endorser,[5] endorser liability is not the rule.[6] The trend of products liability law, beginning with the aban-

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[1][O]ne who permits the use of his statements, pictures, or name for the purpose of promoting the sale or use of a product or service. The endorsement may assume varied forms. . . . The basic purpose is still the same—to sell the product by indicating approval of it.

Note, *Liability of Advertising Endorsers*, 2 Stan. L. Rev. 496, 497 (1950). Such endorsers or certifiers include testing agencies like Good Housekeeping, Underwriters' Laboratories, Inc. (nonprofit), and United States Testing Co. (for profit), who certify products for either manufacturer or consumer clients.

[2]Gregor, *Seal of Approval: The Role of Independent Testing Laboratories*, 50 Management Rev., Jan. 1961, at 38-40.

[3]Endorsers serving manufacturer clients are under contract with the manufacturer and include, for example, Good Housekeeping and Underwriters' Laboratories, Inc., while endorsers serving consumer clients operate independently and include Consumers Union and Consumers' Research, Inc. Whichever client is served, consumer reliance on the endorser's tag or seal of approval is important. *See, Parents' Seal Is Still Assurance of Worthiness: Hecht*, 37-4 Advertising Age, Nov. 14, 1966, at 135; *Magazine Puts Seal on Its Own Success*, Bus. Week, March 19, 1966, at 190, 192, 198; *The Public Gives UL Its Seal of Approval*, Bus. Week, Sept. 18, 1965, at 92, 96; Thompson, *Tools for Confidence Building*, 80-1 Sales Management, Jan. 3, 1958, at 64.

[4]Taylor, *Certification Marks—Success or Failure?*, 23 J. Marketing, July 1958, at 39. It appears that consumer reliance on certification marks is the main reason for employing the endorsers' services.

> Whatever it is—and whether or not the consumer actually stops to read an entire tag or seal—its mere presence on a product is reassuring and influences the buyer. He feels secure in his purchase—and the manufacturer knows that the buyer will prefer an authorized product.

Gregor, *supra* note 2, at 38.

[5]*E.g.*, Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109 (D. Del. 1967); Hanberry v. Hearst Corp., 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (Ct. App. 1969); Buszta v. Souther, 102 R.I. 609, 232 A.2d 396 (1967).

[6]Liability may depend upon whether the endorser is serving a manufacturer or a consumer client, or whether the cause of action is based upon strict liability or negligent misrepresentation. *But see* Note, *Liability of Certifiers of Products For Personal Injuries to the User or Consumer*, 56 Cornell L. Rev. 132, 136 (1970). A more important fact, however, is that even if the theory of liability is sufficient, the endorser probably will not be liable unless the consumer clearly relied on the certification. One exception to this theory would be Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109 (D. Del. 1967), where the certifier was held liable even without consumer reliance.

donment of privity,[7] seems to indicate that the endorser or manufacturer, rather than the innocent consumer, is the one most able to spread the risk of loss.[8] As consumer reliance on certification increases, the need to establish a basis for endorser liability will grow.

This comment will examine possible areas of endorser liability, including negligence, negligent misrepresentation, and strict liability, and then discuss the possibility of their application in Mississippi.

II. Negligence and Negligent Misrepresentation

Endorser liability for both personal and economic injury is most common today in cases involving negligent misrepresentation.[9] In the early days of consumer litigation, however, the doctrine of contractual privity prevented third parties from recovering from endorsers and certifiers with whom they had no contractual relation. Such application of privity in certification situations appears to have originated with the 1924 Illinois case of *National Iron & Steel Co. v. Hunt.*[10] The defendant in that case was employed by the seller to inspect and certify rails. The plaintiff bought rails in reliance upon the certification, and later sought to return defective ones. The court, refusing to impose liability on the certifier, held that liability extended only to those who paid for the

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[7]An injured consumer could not recover against the manufacturer (or seller) of goods unless there was some privity of contract between them. *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1055 (1916) (dissent). But beginning with *MacPherson*, the privity requirement was abandoned and even a remote consumer could recover for personal injury caused by the negligence of the manufacturer. Nearly every state, including Mississippi in State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967), has abandoned privity. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965).

[8]*See* Note, *supra* note 6, at 143-44. For another discussion of risk-spreading, see Maraist & Barksdale, *Mississippi Products Liability—A Critical Analysis*, 43 Miss. L.J. 139, 163-67 (1972).

[9]For a discussion of negligent misrepresentation, see W. Prosser, Prosser on Torts §§ 33, 105, 107 (4th ed. 1971) [hereinafter cited as Prosser]. Prosser indicates that in the tort of negligent misrepresentation:

> [T]he circumstances must be such that the defendant is under a duty to the plaintiff to exercise reasonable care in giving the information, and that reliance upon what he says, with resulting danger is reasonably to be expected.

Id. § 33, at 179. The key to understanding negligent misrepresentation is that the certifier may be held liable for negligent certifications made to and relied upon by third persons. *See id.* at 178.

A negligent misrepresentation then may be defined as: "[A] false or misleading statement, the maker of which, although he may have honestly believed it to be true, failed to use reasonable care in checking its factual basis." 22 Ala. L. Rev. 603, 603 n.4 (1970).

[10]312 Ill. 245, 143 N.E. 833 (1924).

inspector's services; privity, then, was required for recovery in cases of economic loss.[11] The *Hunt* rule was followed in Illinois as recently as 1961, in *Albin v. Illinois Crop Improvement Association, Inc.*,[12] where the court held that lack of privity prevented a third party purchaser of seed from bringing an action against a certifier of the quality and purity of the vendor's seed. By this time, however, courts in New York and California had permitted recovery for economic loss despite lack of privity.[13] In 1969 the Illinois Supreme Court also departed from the *Hunt-Albin* line. In *Rozny v. Marnul*[14] the Illinois court held that a surveyor who made an inaccurate survey was liable under a theory of tortious misrepresentation to one other than the party for whom the survey was made.[15]

A 1972 New Jersey case, *Gold Mills, Inc. v. Orbit Processing Corp.*,[16] articulates the demise of the privity doctrine. In that case a textile owner brought an action against a bailee and a detective agency to recover for the loss of goods which were stolen from the bailee's premises. The owner claimed that since the detective agency had contracted with the bailee to guard the goods, the agency was liable to the owner for failure to exercise due care. The court, rejecting a breach of contract theory, used negligence as the basis of liability. After indicating that negligent injury to third persons was compensible despite lack of privity,[17] the court said:

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[11]*But see* Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922)(recovery for economic loss resulting from negligent misrepresentation despite lack of privity). This case may be distinguished from *National Iron & Steel* in that the certifier in *Glanzer* knew that third persons relied on the certification, whereas the certifier in *National Iron & Steel* did not. *Glanzer* was limited by Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), when the court refused to extend recovery in negligent misrepresentation to an indeterminate class for indeterminate amounts. For further discussion of *Glanzer* and *Ultramares* see, Comment, *Potential Liability of Non-Manufacturer Certifiers of Quality*, 10 VILL. L. REV. 708, 710-11 (1965).

Prior to the rule in *National Iron & Steel* as to economic loss, Van Winkle v. American Steam Boiler Ins. Co., 52 N.J.L. 240, 19 A. 472 (Sup. Ct. 1890), held that privity was not required to recover for physical harm or injury. See text accompanying notes 23 through 29 *infra*.

[12]30 Ill. App. 2d 283, 174 N.E.2d 697 (1961).

[13]*E.g.*, Hardy v. Carmichael, 207 Cal. App. 2d 218, 24 Cal. Rptr. 475 (Dist. Ct. App. 1962); M. Miller Co. v. Central Contra Costa Sanitary Dist., 198 Cal. App. 2d 305, 18 Cal. Rptr. 13 (Dist. Ct. App. 1961); Du Rite Laundry, Inc. v. Washington Elec. Co., 263 App. Div. 396, 33 N.Y.S.2d 925 (1942).

For a brief discussion of this point, see Schwartz, *A Products Liability Primer*, 33 AM. TRIAL LAW. J. 65, 80-81 (1970).

[14]43 Ill. 2d 54, 250 N.E.2d 656 (1969).

[15]The *Rozny* court in rejecting privity stated: "[T]ort liability will . . . be measured by the scope of duty owed rather than the artificial concepts of privity." 250 N.E.2d at 660.

[16]121 N.J. Super. 370, 297 A.2d 203 (Lower Div. 1972).

[17]297 A.2d at 205.

> I can also fathom no reason why the privity rule or the dichotomy between misfeasance and nonfeasance should control in the area of liability of an independent contractor to a third party. . . . Such liability should exist when the contractor has undertaken performance, [even though] his negligent performance results from the doing of something which a reasonably prudent person would not have done . . . . So long as the privity rule is no longer viable in the area of tort liability there is no reason why a contractor should not have the same duties toward a stranger to the contract as any member of society to another, *i.e.*, to exercise due care to avoid injury to another's person or property.[18]

The court noted that such liability would not attach where the contractor had never commenced performance.[19] The attack on privity, which began in 1916 and lasted into the 1960's,[20] has culminated in the abandonment of privity as a requirement for recovery in negligence actions[21] in almost every state.[22] Application of this trend to product endorser negligence situations, however, has not been uniform. Some early cases found a variety of ways to allow consumer recovery against endorsers with whom they were not in privity. In the 1890 New Jersey case of *Van Winkle v. The American Steam Boiler Insurance Co.*,[23] for example, the defendant, after examining and testing a paper company's steam boilers, certified them for safety. Yet it was held liable for negligent inspection to a retail purchaser who had relied upon the certification and was injured when the boiler exploded. The court ruled that the misrepresen-

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[18]*Id.* at 206.

[19]*Id.*

[20]Although initiated in New York in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916), the abandonment of privity was not achieved in some jurisdictions until the late 1960's. See note 7 *supra*. The attack on privity continued in Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922)(bean weigher liable to buyers despite lack of privity); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960)(auto manufacturer and dealer held liable); and Cintrone v. Hertz Truck Leasing & Rental Serv., 45 N.J. 434, 212 A.2d 769 (1965)(lessor held liable to third person). The principle was well stated in Connor v. Great Western Sav. & Loan Ass'n, 69 Cal. 2d 850, 858, 447 P.2d 609, 617, 73 Cal. Rptr. 369, 377 (1968):

> Privity of contract is not necessary to establish the existence of a duty to exercise ordinary care not to injure another, but such duty may arise out of a voluntarily assumed relationship if public policy dictates the existence of such a duty.

For an in-depth discussion of the privity doctrine, see Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

For a discussion of the privity doctrine in Mississippi, see Maraist & Barksdale, *supra* note 8; Witherspoon, *Torts or Warranties?*, 39 MISS. L.J. 199 (1968).

[21]*See* PROSSER §§ 96-97.

[22]*Id.* § 97, at 655.

[23]52 N.J.L. 240, 19 A. 472 (Sup. Ct. 1890), *discussed in* RESTATEMENT (SECOND) OF TORTS § 311, Illustration 9 at 109 (1965) *and* Comment, *Products Liability—Liability of Certifiers of Quality to Consumers*, 14 S.D.L. REV. 100, 101 (1969).

tation discouraged the injured party from taking his own precautions.[24] Similarly, in the 1942 New York case of *Du Rite Laundry, Inc. v. Washington Electric Co.*,[25] the plaintiff, after employing the Hartford Steam Boiler Inspection Company to inspect machinery, bought some from the defendant who sold it relying upon the inspection company's approval. When the machinery proved defective, the inspection company was held liable to the defendant, who was in turn liable to the plaintiff, because the plaintiff had relied upon the original inspection.

Du Rite, *Van Winkle*, and other early cases[26] finding independent certifiers liable to ultimate consumers all involved such "inherently dangerous" products as steam boilers[27] and elevators.[28] New avenues to recovery, however, were developed by the case law of the late 1960's.[29]

In a 1967 Rhode Island case, *Buszta v. Souther*,[30] the defendant, the operator of an official motor vehicle inspection station, was held liable for careless inspection of the plaintiff's automobile. The court, in considering the inherent danger of an improperly inspected vehicle, held that the defendant should have foreseen that injury to the owner and others could have resulted.[31]

A 1967 federal district court case applying Virginia law, *Hempstead v. General Fire Extinguisher Corp.*,[32] suggests ultimate consumer recovery from an endorser in some situations despite lack of consumer reliance. In that case the plaintiff, while helping put out a fire, was injured when a co-worker's fire extinguisher exploded. Alleging that the manu-

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[24]*See* PROSSER § 33, at 179.

[25]263 App. Div. 396, 33 N.Y.S.2d 925 (1942).

[26]*E.g.*, Evans v. Otis Elevator Co., 403 Pa. 13, 168 A.2d 573 (1961); Bollin v. Elevator Constr. & Repair Co., 361 Pa. 7, 63 A.2d 19 (1949).

[27]Van Winkle v. American Steam Boiler Ins. Co., 52 N.J.L. 240, 19 A. 472 (Sup. Ct. 1890).

[28]Bollin v. Elevator Constr. & Repair Co., 361 Pa. 7, 63 A.2d 19 (1949).

[29]It is no longer in dispute that one who renders services to another is under a duty to exercise reasonable care in doing so, and that he is liable for any negligence to anyone who may foreseeably be expected to be injured as a result. This applies in particular to the testing of products, by those who do not supply them.

PROSSER § 104, at 679.

[30]102 R.I. 609, 232 A.2d 396 (1967).

[31]232 A.2d at 400.

[32]269 F. Supp. 109 (D. Del. 1967), *discussed in, e.g.*, Note, *Tort Liability of Independent Testing Agencies*, 22 RUTGERS L. REV. 299 (1968); 53 IOWA L. REV. 772 (1967); 46 TEXAS L. REV. 995 (1968).

For a discussion of pre-*Hempstead* endorser liability, see Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1966); Comment, *Potential Liability of Non-Manufacturer Certifiers of Quality*, 10 VILL. L. REV. 708 (1965); Note, *Liability of a Testing Company to Third Parties*, 1964 WASH. U.L.Q. 77 (1964); 36 NOTRE DAME LAW. 176 (1961).

facturer was negligent, the plaintiff also claimed that Underwriters' Laboratories, the testing company employed by the manufacturer, was liable on three theories:[33] (1) Underwriters' negligently approved the design of the extinguisher despite its inherent dangerousness; (2) Underwriters' negligently allowed its label to be placed on the extinguisher by the manufacturer; and (3) Underwriters' label was a misrepresentation as to its testing and inspection. The court, in upholding the endorser's liability, based its finding on Section 324A(a) of the *Second Restatement of Torts:*

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm . . . .

The court also rejected Underwriters' defense that the plaintiff's recovery was barred due to lack of privity.[34]

Hempstead's importance, aside from its rejection of the necessity of privity, lies in the fact that no showing of reliance by the injured party on the negligent inspection and endorsement was required.[35] This reasoning would make the certifier of any inherently dangerous product[36] liable for its negligence regardless of consumer reliance on the endorsement. The reasoning of the court seems equally applicable to cases of negligent misrepresentation.[37]

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[33]269 F. Supp. at 111.

[34]*Id.* at 117-18. The court indicated that Virginia was broadening the scope of accountability in products liability and was reducing the situations in which privity had been required.

[35]The court in *Hempstead* limited its acceptance of *Restatement* Section 324A to subsection (a); it did not adopt subsection (b), or the reliance part of the section, subsection (c):

> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The court apparently did not adopt subsection (c) because then it would not have been able to hold the certifier liable since there was no indication that either the plaintiff or the manufacturer client relied upon the certification.

Nevertheless, the *Restatement* does not require "that a combination of, or all of, the theories [of section 324A] be proven to establish liability. . . . Proof of either theory is a valid basis for recovery." Ray v. Transamerica Ins. Co., 46 Mich. App. 647, 208 N.W.2d 610, 615 (Ct. App. 1973).

[36]The decision in *Hempstead* concerned products of inherent danger. The court clearly held that the fire extinguisher was such a product. 269 F. Supp. at 115.

[37]Note, *supra* note 6, at 135.

At least one court has held an endorser liable for a consumer's reliance on what she reasonably *thought* the endorsement imported. In the 1969 case of *Hanberry v. Hearst Corp.*,[38] the plaintiff slipped and injured herself while wearing new shoes which bore the *Good Housekeeping* seal.[39] Citing Section 311 of the *Restatement of Torts* ("Negligent Misrepresentation Involving Risk of Physical Harm")[40] the court ruled that the plaintiff had relied upon the defendant's seal, believing that the shoes had been examined and tested, and that she could recover for the defendant's negligence in putting its seal on defectively designed shoes.[41]

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protec-
> upon it the duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public who

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[38]276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (Ct. App. 1969), *discussed in* Carlin, *Liability of the Product Endorser—Developing a New Perspective*, 15 N.Y.L.F. 835 (1969); Note, *supra* note 6; 22 ALA. L. REV. 603 (1970); 4 GA. L. REV. 620 (1970); 6 WAKE FOREST INTRA. L. REV. 545 (1970); 11 WM. & MARY L. REV. 771 (1970).

[39]Since *Good Housekeeping* was published by Hearst Corp., the latter was made defendant herein. The Good Housekeeping Consumers' Guaranty at the time of *Hanberry* was:

> We satisfy ourselves that products and services advertised in GOOD HOUSEKEEPING are good ones and that the advertising claims made for them in our magazine are truthful. If any guaranteed product or service advertised in GOOD HOUSEKEEPING proves to be defective, it will upon request and verification be replaced, or the money the consumer paid for it will be refunded. Insurance, realty, automobile, public transportation, travel facilities, and institutional advertisements are not guaranteed.

162 GOOD HOUSEKEEPING, March 1966, at 6.

Compare this older guaranty with the current guaranty as found in 176 GOOD HOUSEKEEPING, June 1973, at 6. The current guaranty is in some ways broader, yet in some ways narrower, than its predecessor. The current guaranty, for example, pertains to any product or service advertised in the magazine, while the former guaranty was restricted to only "guaranteed" products or services. Yet the current guaranty also adds that, except for the consumer's guaranty, the magazine made no other warranty or guaranty with respect to its products and services.

[40](1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.

RESTATEMENT (SECOND) OF TORTS § 311 (1965).

[41]The plaintiff alleged that the shoes were defectively designed because they had a low coefficient of friction on vinyl and other floor coverings. 81 Cal. Rptr. at 521.

> rely on its endorsement are not unreasonably exposed to the risk of harm.[42]

Hearst defended on the grounds that it could not be held liable in the absence of privity, and that its representation was a mere statement of opinion and not a material fact. The court rejected the privity defense on public policy grounds,[43] and answered the "mere opinion" argument by saying:

> By the very procedure and method it used, [Hearst] represented to the public it possessed superior knowledge and special information concerning the product it endorsed. Under such circumstances, [Hearst] may be liable for negligent representations of either fact or opinion.[44]

Hanberry, the first state court decision holding an independent endorser of consumer goods liable to a purchaser, followed the trend away from the privity doctrine and placed the loss upon the party best able to bear the risk of injury.[45] The court reasoned that the endorser can spread the cost among his clients, and eventually throughout the public, by increasing the cost of endorsements to compensate for recovery by consumers (*i.e.*, the public), while the loss might be financially crippling to a single consumer.[46] In this light, there appears little reason why at least those certifiers and endorsers who are monetarily motivated should not be held liable.[47]

The *Hanberry* court rejected the plaintiff's argument that she could proceed in warranty or on strict liability in tort.[48] The court pointed out that those theories of recovery were available against only those involved in manufacturing goods for, or supplying them to, the public.[49] This view would require the plaintiff to prove that the endorser was involved in the manufacturing or the supplying process, by showing that it had made a representation as to the examination and testing of each individual product. It would seem, however, that most cases involving facts on which warranty or strict liability could be pleaded against endorsers

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[42]81 Cal. Rptr. at 522.

[43]*Id.*

[44]*Id.* at 523.

[45]22 ALA. L. REV. 603, 606 (1970).

[46]Since certification increases consumer buying, note 4 *supra*, the manufacturer should be willing to pay increased certification costs to aid in risk spreading. *See* note 8 and accompanying text *supra*.

[47]The manufacturer is often held to bear the risk, *see* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944)(Traynor, J., concurring opinion), and this reasoning seems applicable to those economically motivated endorsers whose certifications are relied upon by the consumer.

[48]81 Cal. Rptr. at 524.

[49]*Id.*

would also support allegations of negligent misrepresentation, as were found dispositive by the *Hanberry* court and as are expressed by Section 311 of the *Restatement*.[50]

The *Hempstead* decision offers a means by which consumers who are not purchasers can recover against negligent endorsers, even though the consumer did not rely on the endorsement.[51] This doctrine offers relief to a broad class of innocent consumers, but its utility is limited by the court's finding that a fire extinguisher is an inherently dangerous device.[52] The *Hanberry* decision, by not limiting recovery to cases involving inherently dangerous items, offers a firmer, broader basis[53] for product endorser liability.

Several post-*Hanberry* decisions have found another avenue to recovery against negligent product endorsers in Section 324A of the *Restatement*.[54] In a 1970 Fifth Circuit case, *Hill v. United States Fidelity & Guaranty Co.*,[55] for example, the plaintiff was injured and her husband killed in a hotel fire. She sought damages from the hotel's insurer alleging negligence in safety inspection and in safety recommendations made to, and relied on by, the hotel. The court, finding the insurer liable on the basis of section 324A, ruled that the hotel had obtained the insurance policies in reliance on prior representations and had subsequently relied on safety inspections.[56] Similarly, in *Johnson v. Aetna Casualty & Surety Co.*,[57] a 1972 federal district court case applying Florida law, the court held a store's insurer liable for negligently failing to discover hazardous conditions which resulted in a fire in which a fireman perished.

Two means have been found, then, to protect innocent third party consumers from the effect of unreliable endorsements: negligent misrep-

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[50]See note 40 *supra*.

[51]See note 35 *supra*.

[52]See note 36 *supra*.

[53]RESTATEMENT (SECOND) OF TORTS § 311 (1965).

[54]Section 324A(a) is found in text following note 33 *supra*, while subsections (b) and (c) are found in note 35 *supra*. Generally, these cases do not involve "product" endorsers for consumer products but are concerned instead with certifiers of quality. Hill v. United States Fidelity & Guar. Co., 428 F.2d 112 (5th Cir. 1970); Johnson v. Aetna Cas. & Sur. Co., 348 F. Supp. 627 (M.D. Fla. 1972); Ray v. Transamerica Ins. Co., 46 Mich. App. 647, 208 N.W.2d 610 (Ct. App. 1973) (plaintiff injured while operating employer's machine and brought action for negligence against the employer's insurer, as a third party, for negligent inspection); Gold Mills, Inc. v. Orbit Processing Corp., 121 N.J. Super. 370, 297 A.2d 203 (Lower Div. 1972) (see discussion of case at text accompanying notes 16 through 19 *supra*).

[55]428 F.2d 112 (5th Cir. 1970).

[56]Section 324A(a) is found in text following note 33 *supra*, while subsections (b) and (c) are found in note 35 *supra*. Section 324A (c) clearly applies in *Hill* because the harm was suffered after the hotel, to whom the services were owed, relied upon the insurers' undertaking, which was the making of periodic safety inspections.

[57]348 F. Supp. 627 (M.D. Fla. 1972).

resentation and section 311, and section 324A and negligence. Although *Hanberry* has not been widely followed in other jurisdictions, the appearance of cases such as *Hill* and *Johnson* show that other courts are in accord with the policy of product endorser liability, and are now only seeking methods of implementation.[58]

III. Strict Liability

Another area of potential endorser liability is strict liability. Generally, strict liability includes three theories: breach of express warranty, breach of implied warranty, and strict tort liability.[59] The use of these theories against manufacturers raises the question whether product endorsers could be held liable on the same basis. Although there is no clear answer, probably strict liability should not be imposed on endorsers serving consumer clients, since they lack direct control over production and are unable to spread the risk of loss among their customers. Endorsers serving manufacturer clients, however, do have some control over production, yet they, like consumer-oriented endorsers, cannot spread the risk of loss as well as can the manufacturer.[60]

It appears that only by stretching the role of the product endorser could strict liability be imposed. In breach of express warranty,[61] for example, the *Restatement* provides that only one engaged in the selling of "goods" or "chattels" is subject to liability, and then only if the consumer suffered physical harm in reliance upon the misrepresentation.[62] Since the product endorser is more the seller of "services" than of "goods," breach of express warranty well might not apply.

Examining the two other strict liability theories produces a similar

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[58]Although *Hill* and *Johnson* are not specifically concerned with product endorsers but with certifiers of quality, the trend still favors increased endorser liability.

[59]*See* Prosser §§ 97-98. For another discussion of strict liability, see Prosser, *The Fall of the Citadel*, 50 Minn. L. Rev. 791 (1966).

[60]A more in-depth discussion of strict liability as applied to the endorser or certifier can be found in Note, *supra* note 6, at 138.

For an examination of strict liability in Mississippi, see Maraist & Barksdale, *supra* note 8, at 148.

[61]An express warranty is defined as: "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain . . . ." Uniform Commercial Code § 2-313 (1962). Mississippi has adopted the same section in Miss. Code Ann. § 75-2-313 (1972).

[62]One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

result. Breach of implied warranty is based on the idea that the goods should be merchantable and fit for the purpose of their ordinary use,[63] while strict tort liability means that liability is "strict" in the sense that it is unnecessary to prove the defendant's negligence.[64] (The two are essentially similar, except that implied warranty sounds in contract, and strict liability sounds in tort.) As to these two theories, the *Restatement* requires neither the making of a representation nor reliance by the user or consumer;[65] nevertheless, the section applies only to the "seller" of the product.[66] Since the product endorser is not the "seller,"[67] it is doubtful that either of these theories of liability would effectively apply. There is, however, some authority holding that limited liability under breach of express warranty could be imposed.[68]

Hanberry[69] is an excellent example of a court's refusal to base endorser liability on warranty or strict liability in tort. The court had little trouble finding a basis for endorser liability, yet rejected the aforementioned theories because the product endorser was not directly involved in the manufacturing or supplying process. A 1972 California case, *Kasel v. Remington Arms Co.*,[70] indicated, however, that the product endorser may be subjected to strict liability if its services were a necessary instrument in the stream of commerce, saying:

> [U]nder the stream-of-commerce approach to strict liability no precise legal relationship to the member of the enterprise causing the defect to be manufactured or to the member most closely connected with the customer is required before the courts will impose strict liability. It is the defendant's participatory connection, for his personal

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(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402B (1965).

[63]*See* UNIFORM COMMERCIAL CODE §§ 2-314, -315 (1962).

[64]*See* PROSSER §§ 75, 98.

[65]RESTATEMENT (SECOND) OF TORTS § 402A, comment *m* at 355 (1965).

[66](1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product . . . .

RESTATEMENT (SECOND) OF TORTS § 402A(1)(a) (1965). "[T]his section applies to any person engaged in the business of selling products for use or consumption." *Id.* at comment *f*.

[67]One may argue that since the role of the product endorser, especially those serving manufacturer clients, is so essential in the ultimate selling of the goods, that the endorser is in fact a seller in that it sells to the public the safety and trustworthiness of the goods. See definition of "seller" note 66 *supra*.

[68]Note, *supra* note 6, at 145.

[69]*See* note 38 *supra*.

[70]24 Cal. App. 3d 711, 101 Cal. Rptr. 314 (Ct. App. 1972).

> profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product (and not the defendant's legal relationship . . . with the manufacturer or other entities involved in the manufacturing-marketing system) which calls for imposition of strict liability.[71]

The *Kasel* court suggested that *Hanberry* may have based the defendant's liability on the stream of commerce approach to strict liability.

> (The rationale of *Hanberry* may warrant reevaluation . . . . Where it can be established that defendant by its avowed testing was the responsible inducement for the purchase by plaintiff, we see no reason to hold that defendant was not a necessary instrument in the stream of commerce.)[72]

Although there is still much doubt concerning the use of strict liability theory as a basis for endorser liability, *Kasel* at least suggests such a use. Perhaps as the role and importance of the product endorser continue to grow, the courts will be more willing to use the strict liability theories.

IV. A Mississippi Perspective

Despite Mississippi's recent expansion of products liability law,[73] there remains considerable doubt as to whether the courts will impose liability on product endorsers. The imposition of liability on endorsers initially requires willingness to abandon the traditional products liability concept of holding only manufacturers or distributors liable for defective products. Since Mississippi already has shown some reluctance to hold even these parties liable,[74] the imposition of liability on the product endorser may not follow quickly. Mississippi case law reveals, however, that the imposition of liability on the endorser, especially if based on negligence, is at least possible.

There are no Mississippi cases specifically on point with either *Hempstead* or *Hanberry*, although one factually similar case, *J.C.*

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[71] *Id.* at 725, 101 Cal. Rptr. at 323.

[72] *Id.* at 726-27, 101 Cal. Rptr. at 324.

[73] Mississippi abandoned privity in 1966 while adopting strict liability in tort. Mississippi's strict liability seems to demand proof that the product was defective in design or manufacture, which is similar to proof of negligence in design or manufacture. See State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967).

For an excellent discussion of the recent developments in Mississippi products liability law, see Maraist & Barksdale, *supra* note 8.

[74] General Motors Corp. v. Howard, 244 So. 2d 726 (Miss. 1971); Ford Motor Co. v. Simpson, 233 So. 2d 797 (Miss. 1970); Walton v. Chrysler Motor Corp., 229 So. 2d 568 (Miss. 1969).

Penny Co. v. Morris,[75] was decided in 1935. In that case, the plaintiff/appellee, while wearing a pair of new slippers purchased from the defendant, was injured when the heel of one slipper broke, causing her to fall. The plaintiff claimed that at the time of purchase she had inquired about the safety of the loose heel, and that defendant's business manager had said, "I will guarantee you that heel will not come off."[76] Since the plaintiff wore the slippers in reliance upon the vendor's competence, the court, basing its decision on negligence, found for the plaintiff, and said:

> A vendor of a chattel made by a third person which is bought as safe for use in reliance upon the vendor's profession of competence and care is subject to liability for bodily harm caused by the vendor's failure to exercise reasonable competence and care to supply the chattel in a condition safe for use.[77]

The major difference between *Morris* and the product endorser cases is that the guarantee given in the former was not made by a certifier or endorser, but by a vendor of the chattel. One could argue that the only reason the court found liability was because the defendant was a vendor and not just a certifier of the goods, so that the plaintiff was in privity with the defendant. Nevertheless, the fact that the court found liability based on plaintiff's reliance upon defendant's negligent guarantee provides a similarity to *Hanberry*. Suppose, for example, that the *Morris* court had applied Section 311 of the *Restatement*[78] to determine the defendant's liability. It appears that *Morris* could satisfy section 311(1)(a) because the defendant negligently gave incorrect information to the plaintiff, who reasonably relied on it and thereby suffered physical harm. One may also argue that section 311(2)(a) applies because the defendant was negligent in failing to exercise reasonable care in ascertaining whether the heel would fall off. Since the reliance factor was present, it appears that the only reason liability might not be found, if the defendant were a certifier rather than a vendor, would be that the plaintiff would lack privity with the defendant. Mississippi, however, has abandoned the privity requirement,[79] so that section 311(1)(b) might support recoveries against certifiers.

With the abandonment of the privity doctrine, Mississippi courts might also be persuaded to apply Section 324A of the *Restatement*[80] in

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[75]173 Miss. 710, 163 So. 124 (1935).

[76]*Id.* at 714, 163 So. at 124.

[77]*Id.* at 716, 163 So. at 125, *quoting* RESTATEMENT OF TORTS § 401 (1934).

[78]See note 40 *supra*.

[79]See note 73 *supra*. It appears that privity is no longer required in suits based on negligence. *See* Maraist & Barksdale, *supra* note 8, at 145-46.

[80]Section 324A (a) is found in text following note 33 *supra*, while subsections (b) and (c) are found in note 35 *supra*.

imposing liability on product endorsers. Considering the *Morris* facts, for example, with the variation that the defendant be an endorser serving a manufacturer-client rather than a vendor, one could argue that sections 324A(a) and (c) would apply; first, because the defendant failed to use reasonable care, and second, because the plaintiff relied upon the defendant's guarantee. It must be remembered, however, that since Mississippi will not impose liability on the manufacturer or seller for injury caused by obvious danger[81] (except in cases involving express warranties, such as *Morris*) it appears that this would similarly free the product endorser of liability in a like situation.

The prospects of basing endorser liability in Mississippi on warranty or strict liability in tort, are far more remote. In *State Stove Manufacturing Co. v. Hodges*,[82] Mississippi adopted strict tort liability based upon Section 402A of the *Restatement*.[83] Since section 402A specifically deals with the "seller" of goods, there is some doubt as to whether an endorser would fall within that section.[84] Section 402A, however, eventually may be applied to all participants in the "stream of commerce," and thereby include the product endorser.

In considering whether Mississippi courts would impose liability on the product endorser, an examination of another area of products liability is revealing. In *Walton v. Chrysler Motor Corp.*,[85] Mississippi had an opportunity to expand its products liability law by imposing liability on manufacturers for injuries caused by the "second accident."[86] The court refused to extend manufacturer liability to injury resulting from "defects" not themselves causative of the original ("first") accident, thus rejecting the idea of a duty to make vehicles "crashworthy." Although the authority upon which *Walton* was based has come under strong attack,[87] Mississippi has adhered to the *Walton* philosophy.[88] By its refusal to expand manufacturer liability, Mississippi may very well have laid a foundation for refusal to impose liability on the product endorser.

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[81]Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962).

[82]189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967).

[83]See note 66 *supra*.

[84]For further discussion, see notes 66 & 67 and accompanying text *supra*.

[85]229 So. 2d 568 (Miss. 1969).

[86]Since the "first accident" may involve vehicle-to-vehicle contact, then the "second accident" would involve any injury thereafter and in consequence sustained by persons within the vehicle.

[87]*Walton* was based upon Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966), *criticized in* Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Bremier v. Volkswagen of America, Inc., 340 F. Supp. 949 (D.D.C. 1972); Badorek v. General Motors Corp., 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (Ct. App. 1970); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); PROSSER § 96, at 646; Schwartz, A Products Liability Primer, 33 AM. TRIAL LAW. J. 65, 99 (1970).

[88]See General Motors Corp. v. Howard, 244 So. 2d 726 (Miss. 1971); Ford Motor Co. v. Simpson, 233 So. 2d 797 (Miss. 1970).

V. Conclusion

The absence of Mississippi decisions similar in logic to *Hempstead* or *Hanberry* permits one only to speculate as to the eventual Mississippi result. Perhaps the slow movement of Mississippi products liability law indicates that imposition of endorser liability is not imminent. Nevertheless, Mississippi should not neglect an opportunity, should one arise, to move to the forefront in this area of products liability by clearly establishing the liability of the product endorser. As the *Hanberry* court pointed out, one "voluntarily assuming this business relationship" has "placed itself in the position where public policy imposes upon it the duty to use ordinary care" in making an endorsement so that consumers who rely thereon "are not unreasonably exposed to the risk of harm." In making endorsements, these parties represent that they possess "superior knowledge and special information concerning the product."[89] The endorser sells a product, in effect, when he sells his endorsement; if it were not felt that the endorsement will be relied upon and thereby increase the value of the endorsed product, the cost of the endorsement would not be added to the price of the product. When he so enters the stream of commerce, the endorser should be held liable for the harmful result if he induces the relatively uninformed consumer to rely to his detriment on a negligent or otherwise wrongful endorsement.

Arnold Harry Zudick

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[89] *See* text accompanying notes 42 & 44 *supra*.

THE MISSISSIPPI UNIFORM LIMITED PARTNERSHIP ACT

Introduction

In 1964 Mississippi, following the lead of the majority of the states,[1] adopted the Uniform Limited Partnership Act (ULPA),[2] thereby providing a valuable tool for both investors and owners of businesses. The Mississippi statutes[3] allow the investor to contribute capital to a business venture and receive a share of the profits while maintaining certain tax advantages and avoiding the unlimited liability common to ordinary partnerships. The owner of a business also may utilize the statutory limited partnership to secure capital without relinquishing any substantial control of the business to the investor.

This two-part comment is designed to provide a view of the common uses, benefits, taxation aspects, and statutory operating procedure of the limited partnership in Mississippi, with the aim of aiding the attorney in advising clients who may benefit from the use of the limited partnership. Part I will acquaint the reader with the procedural requirements for formation, operation, and dissolution of the Mississippi limited partnership. Part II focuses on several aspects of partnership taxation peculiar to the limited partnership. Part II, however, is not designed as a definitive explanation of partnership taxation, but rather as an explanation of those aspects of taxation most common to the limited partnership.

I. The Uniform Limited Partnership Act

A. Definitions and General Description

A partnership is basically "an association of two or more persons to carry on, as co-owners, a business for profit."[4] This type of business arrangement is most commonly referred to as a *general* partnership,[5] which usually consists of a voluntary contract among persons to place their money and skills into a business with the understanding that they will share profits and losses proportionately between them.[6] Businesses

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[1]The ULPA has presently been adopted in approximately three-quarters of the states. 2 J. Barrett & E. Seago, Partners and Partnerships, Law and Taxation § 2, at 492 (1956).

[2]Law of April 22, 1964, ch. 271, §§ 1-32, [1964] Gen. Laws Miss. 348-58.

[3]Miss. Code Ann. §§ 79-13-1 to -57 (1972).

[4]Uniform Partnership Act § 6(1).

[5]For a definition of a general partnership see J. Crane & A. Bromberg, Law of Partnership §§ 4, 31-38 (1968).

[6]J. Story, Story On Partnership § 2, at 2 (3d ed. 1850); *see, e.g.*, J. Crane & A. Bromberg, *supra* note 5, § 4, at 34.

are operated as partnerships for various reasons, including: (1) the relatively simple procedures for formation, operation, and termination; (2) the flexibility in allocation of profits and losses; (3) the tradition of transacting business in the partnership form in particular professions; and (4) the distinctive federal income tax treatment of partnerships as compared to that of other business forms.[7]

Although the general partnership is a very useful type of business organization, there are numerous occasions in which operators of businesses need and desire to secure capital from outside sources without sacrificing control of the business. In such situations a *limited* partnership may be used.

The limited partnership is purely a creature of statute.[8] It consists of one or more limited partners whose liability to third persons is limited to the amount of his capital contribution and profits received by reason of the contribution,[9] and one or more general partners whose liability to third persons is extended to all obligations incurred by the partnership,[10] and whose responsibility for the active management and control of the business is full and complete, to the substantial exclusion of the limited partners. Limited partners who participate in the management and control of the partnership risk the danger of becoming liable as general partners.[11] Thus, by using the limited partnership form, owners of firms can give capital contributors a share of the profits in lieu of an interest in, and partial control of the business.[12] The limited partnership has been described as a "hybrid" organization[13] combining some of the best features of both the general partnership and the corporation. It benefits from the same tax advantages as the general partnership[14] as well as from some of the limited liability advantages of a corporation.[15]

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[7]Spada & Ruge, *Partnerships — Statutory Outline and Definition*, 161 TAX MANAGEMENT PORT. A-1 (1967). The tax treatment of the partnership is provided for in Subchapter K of the Internal Revenue Code of 1954.

[8]J. CRANE & A. BROMBERG, *supra* note 5, § 26, at 143-45 (1968); W. GEORGE, HANDBOOK OF THE LAW OF PARTNERSHIP §§ 184-85 (1897); S. ROWLEY, PARTNERSHIP § 53.24, at 500 (1960).

[9]MISS. CODE ANN. § 79-13-103 (1972). *See also id.* §§ 79-13-5(1)(f),(i), which require this information to be included in the partnership certificate. The partnership certificate must be filed for record in accordance with Section 79-13-5(1) of the Code. *See* text accompanying note 26 *infra*.

[10]*Id.* §§ 79-13-3, -103.

[11]*Id.* § 79-13-15.

[12]2 J. BARRETT & E. SEAGO, *supra* note 1, § 1, at 483.

[13]J. MULDER, DRAFTING OF PARTNERSHIP AGREEMENTS 25 (5th ed. 1969).

[14]*See* INT. REV. CODE OF 1954, §§ 701-771.

[15]J. MULDER, *supra* note 13.

B. The Mississippi Uniform Limited Partnership Act

The limited partnership was first recognized in 12th century Italian commercial centers as a method by which wealthy nobles could invest their capital without revealing their identity.[16] The form was later adopted by the French who brought the system to Louisiana and Florida.[17] In 1822 New York enacted the first limited partnership statute in the United States, modeling it on the French design.[18] In 1916, the ULPA, modeled on the New York act, was adopted and recommended to the legislatures of the states by the Conference of Commisssioners on Uniform State Laws.[19] The legislative intent of the ULPA was to make the laws concerning limited partnerships uniform in order to encourage trade by permitting investors to put their money into a partnership consisting of general partners possessed with business skills, without becoming a general partner or risking anything in the business except the original investment.[20]

Unlike the general partnership, which may be informally organized under an oral agreement, the limited partnership must be formed according to statutory procedures.[21] General partnership rules apply to limited partnerships except where the limited partnership statutes are inconsistent with such rules.[22] The Mississippi statutes describe a limited partnership as consisting of one or more limited partners who are not bound by the obligations of the partnership, and one or more general partners[23] who are so bound, and who manage and control the business subject to the restrictions in the partnership certificate or agreement.[24] Generally, a limited partnership may carry on any business in which a general partnership may engage.[25]

1. Formation

Persons desiring to form a limited partnership are required to sign and swear to a certificate which must be properly acknowledged and filed with the records of corporate charters in the chancery clerk's office of the county in which the firm's principal place of business is located.[26]

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[16]2 S. ROWLEY, PARTNERSHIP § 53.0, at 550 (2d ed. 1960).
[17]*Id.*
[18]Comment, *The Limited Partnership*, 45 YALE L.J. 895-96 (1936).
[19]Lewis, *The Uniform Limited Partnership Act*, 65 U. PA. L. REV. 715 (1917).
[20]S. ROWLEY, *supra* note 16, at 549.
[21]J. MULDER, *supra* note 13, at 26.
[22]UNIFORM PARTNERSHIP ACT § 6(2).
[23]MISS. CODE ANN. § 79-13-3 (1972).
[24]*Id.* § 79-13-19.
[25]*Id.* § 79-13-7.
[26]*Id.* § 79-13-5.

The certificate contains detailed information defining the rights and responsibilities of the partners, and includes such basic information as the name and character of the partnership, the location of the principal place of business, the name and address of each general and limited partner, and the term for which the partnership is to exist.[27] In addition, the certificate requires a statement of the amount of cash and a description of property contributed by each partner, together with its agreed-upon value.[28] The certificate further states when and under what conditions additional contributions may be made by limited partners[29] and provides for an agreed date or occasion for return or withdrawal of the contribution.[30] Major changes in the contribution, including additions, reductions, and withdrawals, require an amendment to the original certificate.[31] The proper wording and filing of the certificate is an extremely important step in the formation of the limited partnership, since the limited partnership is not legally formed until there is substantial good faith compliance with the requirements set out in the certificate.[32] If the certificate contains false information, anyone who suffers loss in reliance on the information may hold liable all parties to the certificate who knew the information to be false.[33] Further, if the requirements of the certificate are not substantially adhered to, the limited partner may be subjected to the unlimited liability of a general partner.[34] A person who contributes capital to a business in the erroneous belief that he has become a limited partner, however, does not become liable as a general partner if upon discovering his mistake he promptly renounces his interest in the profits or other income of the business.[35] Finally, the name of the limited partnership must appear in the certificate,[36] and must not contain the surname of any limited partner unless: (1) it is also the surname of a general partner; or (2) prior to the time the limited partner became such, the business had been carried on under a name in which his surname appeared.[37] If the surname of a limited partner does appear in the name of the partnership, the limited partner will be liable as a general partner to creditors who rely on the representation.[38]

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[27] *Id.* §§ 79-13-5(1)(a)-(e).
[28] *Id.* § 79-13-5(1)(f).
[29] *Id.* § 79-13-5(1)(g).
[30] *Id.* § 79-13-5(1)(h).
[31] *Id.* § 79-13-47.
[32] *Id.* § 79-13-5(2).
[33] *Id.* § 79-13-13.
[34] *Id.* § 79-13-11(2).
[35] *Id.* § 79-13-23.
[36] *Id.* § 79-13-5-(1)(a).
[37] *Id.* § 79-13-11.
[38] *Id.*

In some cases, the partners may make the certificate so complete that it constitutes the total agreement governing the relations between the partners. The more frequent practice, however, is to draft a separate limited partnership agreement specifying all pertinent aspects of the partnership agreed upon by the parties.[39] Although such an agreement may be oral, most are written.[40] Unlike the certificate, the agreement is a private instrument which is usually not recorded and is of concern only to the partners.[41] Generally the limited partnership is an intimate type of business relationship with the partnership agreement outlining the private interrelationships of the partners.[42]

In drafting a limited partnership agreement the attorney should first fully acquaint himself with the details of the business arrangement desired and needed by the prospective partners. The agreement should accurately represent the intentions of the partners.[43] If properly drafted, it should allow the partners to operate the partnership successfully without the constant need for interpretation by the drafting attorney.[44] The agreement, in addition to provisions similar to those required in the limited partnership certificate,[45] should include more detailed provisions concerning the taxation aspects of the business. These could cover agreements as to: (1) the continuation of the business in order to avoid liquidation; (2) the priority of receipt of partnership property and cash upon dissolution; (3) the basis of accounting; (4) the taxable year; (5) the division of partnership property; and (6) each partner's distributive share of income and losses.[46] Of course, the partnership agreement cannot cover every contingency; thus, on matters in which the partnership agreement is silent, local law will govern.[47]

2. Partnership Rights and Contributions

The contributions of a limited partner are limited to cash or other property.[48] All property contributed must be described and given an agreed valuation in the certificate.[49] The limited partner is liable to the

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[39]*See* J. MULDER, *supra* note 13, at 118.

[40]Comment, *A Tax Guide for the General Practitioner: The Tax Consequences of Partnership Formation, Change in Membership, Dissolution, and Termination*, 41 MISS. L.J. 310, 314 (1970).

[41]*See* J. MULDER, *supra* note 13, at 1.

[42]*Id.*

[43]*Id.*

[44]*Id.*

[45]*See* MISS. CODE ANN. § 79-13-5 (1972).

[46]Comment, *supra* note 40, at 314.

[47]*Id.*

[48]MISS. CODE ANN. § 79-13-9 (1972).

[49]*Id.* § 79-13-5(1)(f).

partnership, and to any partnership creditors who rely on the certificate, for any unpaid portion of his agreed contribution.[50] In addition, a limited partner can neither contribute services as his contribution[51] nor take part in the control of the business.[52] If he does either he assumes the unlimited liability status of a general partner.[53] The limited partner, however, may exercise certain rights and powers without relinquishing his status as a limited partner. For example, he may lend money to the firm; receive, on account of resulting claims against the partnership, along with general partners, a pro rata share of the assets;[54] and inspect the books of the partnership.[55] Also, all limited partners must give written consent or ratification to certain acts of general partners such as confessing a judgment against the partnership, possessing and assigning rights in specific partnership property, and admitting additional general or limited partners to the firm.[56]

After the formation of the partnership, additional limited partners may be admitted upon filing an amendment to the original certificate.[57] Such an amendment must clearly set forth the specific change in the certificate and must be signed and sworn to by all general and limited partners, including the partner to be added.[58] A limited partner also may make additional contributions in cash or other property provided the certificate specifies or is amended to specify the additional amount and the dates or occasions when they should be made.[59] Moreover, a limited partner may withdraw all or part of his contribution, either on the agreed date for withdrawal or, if no date is mentioned in the certificate, upon 6 months' written notice to all members.[60] Again, in the event of a withdrawal the certificate must be amended to show the change.[61]

A limited partner may receive a share of the profits of the partnership or other income specified in the certificate.[62] In order for the limited

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[50]*Id.* § 79-13-35.

[51]*Id.* § 79-13-9.

[52]*Id.* § 79-13-15.

[53]*Id.*

[54]*Id.* § 79-13-27(1).

[55]*Id.* § 79-13-21(1)(a).

[56]*Id.* §§ 79-13-19(1)(c)-(f). The general partners may, however, admit additional limited partners without the consent of existing limited partners if the right to do so is contained in the certificate. *Id.* § 79-13-19(1)(f).

[57]*Id.* §§ 79-13-5(1)(k), -19(1)(f).

[58]*Id.* §§ 79-13-49(1)(a), (b).

[59]*Id.* § 79-13-5(1)(g).

[60]*Id.* §§ 79-13-33(2)(b), (c). The statute also allows the limited partner to rightfully demand the return of his contribution upon the dissolution of the partnership. *Id.* § 79-13-33(2)(a).

[61]*Id.* § 79-13-47(2)(a).

[62]*Id.* § 79-13-31.

partner to receive such a share, however, the partnership assets must exceed all partnership liabilities (not including the liabilities to general and limited partners on account of their contributions) after the share of profits is paid.[63] The limited partners may provide for priorities, unequal distribution of profits, and other income, by specifying such a priority agreement in the certificate.[64] In the absence of such a priority statement in the certificate the limited partners share profits and investment returns equally.[65]

There are situations in which a person may be a general partner and a limited partner in the same partnership at the same time. Such a person maintains all the rights and powers of a general partner, and is subject to the same restrictions, with one exception: He retains the rights of a limited partner against other partners with respect to his contribution,[66] including preference in the event of dissolution.[67]

3. Dissolution and Assignments

Generally, a limited partnership is dissolved at the expiration date of the term stated in the certificate,[68] or for such reasons as cause dissolution of a general partnership.[69] A limited partner may cause the entire partnership to be dissolved and have its affairs wound up if he rightfully but unsuccessfully demands the return of his contribution, or if the partnership property is insufficient to meet the other unpaid partnership liabilities when the limited partner would otherwise be entitled to the return of his contribution.[70]

The retirement, death,or insanity of a general partner dissolves the partnership unless either provisions for the right to continue the business are contained in the certificate[71] or all members consent to its continuation.[72] The death of a limited partner, however, does not dissolve the partnership, since his executor or administrator retains all the rights of a limited partner for the purpose of settling his estate. In such cases, the estate is held liable for the limited partner's liabilities.[73]

A limited partner may assign his personal property interest in the

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[63]*Id.*
[64]*Id.* §§ 79-13-5(1)(*l*), -29.
[65]*Id.* § 79-13-29.
[66]*Id.* § 79-13-25.
[67]*See* note 78 *infra.*
[68]MISS. CODE ANN. § 79-13-5(1)(e) (1972).
[69]*See* UNIFORM PARTNERSHIP ACT §§ 29-33.
[70]MISS. CODE ANN. §§ 79-13-33(4)(a), (b) (1972).
[71]*Id.* §§ 79-13-5(1)(m), -39.
[72]*Id.* § 79-13-39(b).
[73]*Id.* § 79-13-41.

partnership[74] and need not provide for the assignment in the certificate. The assignee does not become a substituted limited partner, but is entitled only to the profits or other income which would have been payable to the assignor.[75] For the assignee to become a substitute, the certificate must specifically empower the limited partner to make such a substitution.[76] In the event of a substitution, the certificate must be amended to show the change.[77]

In settling the accounts after a dissolution the creditors are paid first, followed by the limited partners and general partners respectively.[78] Judgment creditors of a limited partner may have the court charge payment of the unsatisfied amount of such judgment debt against the limited partner's interest in the firm[79] and may appoint a receiver, in addition to making all other necessary orders required by the circumstances of the case.[80]

Finally, upon dissolution of the partnership, or if all limited partners cease to be such, the certificate must be cancelled[81] by a writing signed by all members,[82] and filed in the office of the chancery clerk where the certificate is recorded.[83]

II. Tax Considerations, Uses, and Problems of the Limited Partnership

This comment has dealt thus far with the characteristics of a limited partnership and the mechanics of formation in Mississippi. The remainder will focus on the tax aspects of partnership taxation which make the limited partnership advantageous, and some of the problems which the attorney will face in organizing a limited partnership or advising investment in a limited partnership. Because it is beyond the scope of this comment to provide a comprehensive answer to every tax question which relates to a limited partnership, it is respectfully suggested

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[74] *Id.* § 79-13-37(2).

[75] *Id.* § 79-13-37(4).

[76] *Id.* § 79-13-5(1)(j).

[77] *Id.* § 79-13-47(2)(b).

[78] *Id.* § 79-13-45. The statute provides for payments in the following order: (1) to creditors; (2) to limited partners in respect to their profits; (3) to limited partners in respect to their capital contributions; (4) to general partners other than for profits and capital; (5) to general partners in respect to profits; and (6) to general partners in respect to capital.

[79] *Id.* § 79-13-43.

[80] *Id.*

[81] *Id.* § 79-13-47(1).

[82] *Id.* § 79-13-49(2).

[83] *Id.* § 79-13-49(5). The statute also empowers the appropriate chancery court to direct cancellation of the certificate where one of the members wrongfully refuses to execute the written cancellation. *Id.* §§ 79-13-49(3)-(6).

that one consult an accountant or attorney with expertise or experience in the area before seeking to deal with the more intricate tax problems.

A. *Tax Advantages*

What makes one choose the limited partnership form of business? To quote from the prospectus of one limited partnership offering: "[T]he limited partnership form was chosen because it allows a tax advantage to the investors, as well as limited liability."[84] Several interrelated principles combine to make limited partnerships attractive. The first of these is the basic characteristic of partnership taxation.[85] First, income or loss of the business passes through and is taxed to the individuals comprising the partnership.[86] Second, the limited partner may include in the basis of his partnership interest his share of any mortgage or other nonrecourse debt[87] to which the partnership property is subjected. In a limited partnership an increase in the debts of the business usually results in a corresponding increase in the basis of only the general partners, since only they are individually liable for the partnership debts. In the case of a nonrecourse debt, however, where no partner is individually liable, the Treasury Regulations provide that the basis of the partnership interest of all partners (including limited partners) will increase.[88]

The operation of these principles can best be illustrated by an example. Suppose Jones invests $35,000 in an apartment complex; he is 1 of 10 limited partners contributing equal amounts. Since Jones purchased the interest in the partnership, his original basis is his cost, just as in the purchase of any other property.[89] Thus, Jones's cost basis is $35,000. The partnership property, however, is subject to a mortgage of

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[84]Prospectus for Oak Manor Apartments, Meridian, Mississippi, March 23, 1972.

[85]There are numerous tax laws which affect all partnerships. Most of them are contained in Subchapter K of the Internal Revenue Code. INT. REV. CODE OF 1954, §§ 701-771. For a complete discussion of partnership taxation see A. WILLIS, WILLIS ON PARTNERSHIP TAXATION (1971).

[86]Epstein, *Application of the Crane Doctrine to Limited Partnerships*, 45 S. CAL. L. REV. 100 (1972).

[87]A nonrecourse debt is incurred when the creditor agrees to look only to the partnership assets for repayment, or the partnership acquires property subject to a liability which the partnership does not assume. A partner's share of the debt is determined in accordance with his ratio of sharing profits. In a limited partnership this percentage is usually reduced after a certain length of time for the limited partners in favor of the general partner.

[88]Treas. Reg. § 1.752-1(e) (1973). The authority for this principle is Crane v. Commissioner, 331 U.S. 1 (1947). For a detailed discussion of the *Crane* case and its implications see Perry, *Limited Partnerships and Tax Shelters: The Crane Rule Goes Public*, 27 TAX L. REV. 525 (1972); *see* Epstein, *supra* note 86, at 105; Pennell, *Tax Considerations in Organizing a Partnership*, 25 U. SO. CAL. 1973 TAX INST. 333, 375 (1973).

[89]INT. REV. CODE of 1954, §§ 742, 1012.

$2million. Since this is a nonrecourse debt, each partner receives his share of the liability as an increase in the amount of his basis. Jones's basis in the partnership is now $235,000 — his $35,000 investment plus his one-tenth share of the nonrecourse debt. It should be noted here that the amount of each partner's basis is crucial in the limited partnership since losses generated in the first years of operation due to expenses and depreciation may only be deducted to the extent of the partner's basis.[90] The importance of this will become apparent presently. It should also be noted that Jones has no personal liability for his $200,000 share of the mortgage, because the creditor must look to the partnership property alone for satisfaction of the debt. Now suppose that the partnership begins building the apartments and has expenses of $100,000 and depreciation of $20,000 in the first year, and assume that this results in a loss of $120,000 for the partnership. Since the losses of the business pass through to the individual partners, each partner receives one-tenth of the loss. Mr. Jones now has $12,000 in losses which can be used to offset his income from other sources. If Jones is in a high tax bracket, this results in considerable tax savings.

Each partner can only take his share of the losses to the extent of his basis in the partnership. Correspondingly, each time losses are passed through to the partner, he must decrease his basis by that amount.[91] Thus, Jones's basis after the first year will be $223,000 ($235,000 minus $12,000). If these losses continue through the next few years of operations, which they usually do in limited partnerships,[92] it will not be long before Jones has realized tax savings in excess of his initial $35,000 cash contribution.[93]

The tax savings generated by the limited partnership will depend upon what type of business is undertaken. This is because the losses are governed by the deductions which are allowable to that particular business. For example, if the limited partnership is engaged in oil and gas drilling operations, the losses generated will be determined by the deductions allowable under the oil and gas tax provisions. Most of the deductions would be in the form of intangible drilling costs.[94] If the limited partnership is engaged in real estate development, the deductions allowable under taxation of real estate will determine the losses.

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[90]*Id.* § 704(d).

[91]*Id.* § 705(a)(2)(A).

[92]Kaster, *Real Estate Limited Partnerships-Special Tax Allocations*, 1973 N.Y.U. 31st INST. ON FED. TAX. 1799, 1811.

[93]One writer has suggested that benefits equal to the risk involved in most limited partnerships can only be derived by people who are in an income tax bracket of 50 percent or more. Pircher, *Tax Sheltered Investments: What, Who, When and Which?*, 28 BUS. LAW. 897, 913 (1973).

[94]INT. REV. CODE OF 1954, § 263(c).

In this case, depreciation[95] and interest on construction loans,[96] in addition to expenses of construction, will make up the deductions. Any further discussion of these intricate areas of taxation is beyond the scope of this comment;[97] however, they should not be overlooked when considering investment in or organization of a limited partnership.

Although the total amount of deductions allowed may be fixed by the applicable provisions of the Internal Revenue Code, there is available great flexibility in the allocation of the deductions among the partners.[98] Section 704(b)(2) of the Internal Revenue Code allows special allocations among the partners. A special allocation is generally an agreement by the partners to allocate certain items of income, gain, loss, etc. in a proportion other than as provided in a general allocation.[99] A general allocation is one determined by reference to each partner's contribution to the partnership. Thus, it is possible for the developer to receive a greater portion of the profits than his pro rata contribution of capital, while the investors receive a greater share of the deductions.[100] The agreement to allocate in a particular manner should be incorporated into the partnership agreement. As noted in the first part of this comment, the partnership agreement is a private document which is not required to be filed with or approved by any regulatory body.[101] Furthermore, the agreement can be amended to incorporate special allocations at any time prior to the due date of the tax return for the year in question.[102] Even though Section 704 of the Internal Revenue Code specifically provides that allocation among the partners is to be determined by the partnership agreement,[103] subsection (b) of that section states that where "the principal purpose of any provision of the partnership agreement is the avoidance or evasion of any" provision of the income tax law, that portion of the agreement will be disregarded and the allo-

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[95]*Id.* § 167.

[96]*Id.* § 163.

[97]The Internal Revenue Code provisions and corresponding regulations are not clear in this area. This has led to the issuance of several Revenue Rulings. *See* Wolfen & Fossum, *Partnership Elections and Special Allocations*, 25 U. So. Cal. 1973 Tax Inst. 385, 395 (1973).

[98]Int. Rev. Code of 1954, § 704; Treas. Reg. § 1.704-1 (1973); Kaster, *supra* note 92, at 1799, 1800.

[99]Kaster, *supra* note 92, at 1800.

[100]*Id.* at 1802. Thus, the special allocation, if properly used, can generate substantial losses for the investing limited partner, thereby resulting in valuable tax savings if he is in a high income tax bracket.

[101]See note 41 and accompanying text *supra*. The private agreement is to be distinguished from the certificate which is to be filed.

[102]Int. Rev. Code of 1954, § 761(c); Smith v. Commissioner, 331 F.2d 298 (7th Cir. 1964).

[103]Int. Rev. Code of 1954, § 704(a).

cation will be made with reference to each partner's distributive share.[104] It is imperative, then, that care be taken when dealing with a special allocation.[105] Nevertheless, the flexibility allowed in specially allocating the income and loss of the partnership can be used to produce substantial tax benefits.

Tax advantages are the main reasons for utilizing the limited partnership as an investment vehicle. The only major tax disadvantage arises upon ultimate disposition of the partnership interest. When the interest is sold, gain must be realized on the excess of fair market value of the interest over the adjusted basis.[106] If a large amount of deductions have been taken, and the basis reduced accordingly, the taxable gain to be realized would be substantial. There are, however, two mitigating factors in taxing this gain.[107] First, the limited partner has succeeded in deferring any tax on the amount of the losses deducted for the number of years which he held the partnership interest. This is, in effect, an interest free loan of the amount of tax which he would have paid on his ordinary income had it not been for the losses. Secondly, the sale of the partnership interest is treated as the sale or exchange of a capital asset[108] and, as such, is subject to capital gains tax rates rather than the higher ordinary income tax rates.[109] Therefore, the partner has in most instances succeeded in converting ordinary income into capital gain.

B. Uses and Problems of the Limited Partnership

The limited partnership has become one of the most widely used forms of business for investment in tax shelter operations,[110] primarily because of the tax advantages previously outlined.[111] There are, how-

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[104]The distributive share is basically each partner's taxable income or loss. It is computed by reference to Section 702(a)(9) of the Internal Revenue Code.

[105]*See* Wolfen & Fossum, *supra* note 97, at 410-12.

[106]If the partner should die before transferring his partnership interest, however, the transferee at death would receive a basis equal to the fair market value at the date of death regardless of the deceased's basis. There would be no gain realized and the tax would have been permanently avoided. INT. REV. CODE OF 1954, § 1014.

[107]*See* Epstein, *supra* note 86, at 102-03.

[108]Under Section 751 of the Internal Revenue Code, however, unrealized receivables of the partnership and substantially appreciated inventory items of the partnership which are received by the partner in exchange for his interest will not receive capital gains treatment.

[109]This transaction is subject to certain special rules which allow for recapture of depreciation as ordinary income. The recapture provisions have the effect of mitigating some of the benefit to be derived in this instance. INT. REV. CODE OF 1954, §§ 1245, 1250.

[110]Lowell, *Organizing a Limited Partnership to Achieve Real Estate Investment Objectives in Indiana*, 48 IND. L.J. 369 (1973); Tannenbaum, *Leverage Shelter Operations: Oil & Gas, Motion Pictures and Other Theatrical Shelters*, 1973 N.Y.U. 31ST INST. ON FED. TAX. 777.

[111]*See* part II *A supra*.

ever, other factors which should be considered when deciding whether to use the limited partnership form. These factors can best be considered by examining the objectives of the prospective business. The limited partnership is the ideal form of business when the following four business objectives are present.[112] (1) *Substantial borrowing.* If the prospective businessmen seek to borrow substantial sums of money, the limited partnership form should be given great consideration, since the incurment of a nonrecourse debt by a limited partnership increases the likelihood of substantial tax savings for the limited partners.[113] (2) *Limited liability.* If the prospective businessmen seek to offer to investors a share of the profits of the company, without subjecting the investor to unlimited liability, the limited partnership form is desirable. The limited partnership form allows the businessmen to offer the limited liability feature to investors while retaining the advantages of a partnership.[114] (3) *"Pass-through" of tax advantages.* If the prospective businessmen desire to avoid taxation at the business level, the limited partnership form may be appropriate, since the business is not treated as a corporation for tax purposes. This allows tax advantages (substantial losses generated for investors in high tax brackets) to "pass through" directly to the limited partners. (4) *Avoidance of securities regulations.* If the prospective businessmen desire to avoid the disclosure and reporting requirements of federal and state securities laws, the limited partnership form is appropriate. This is because avoidance of securities laws is relatively easy in the limited partnership form as compared to the corporate form.[115] If all four of these objectives are desired the limited partnership would be the most appropriate form of business entity.

The two most frequent uses of the limited partnership in Mississippi have been in real estate and oil and gas situations.[116] It has become the most widely accepted form of business for the small group of investors in real estate.[117] Real estate is appropriate for the limited partnership form because its value generally appreciates and because extensive borrowing is possible. Additionally, the investors can pool their capital and purchase land which would be unobtainable by a single investor.[118] The main attraction to using limited partnerships in oil and gas opera-

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[112]Sonfield, *The Texas Limited Partnership as a Vehicle for Real Estate Investment,* 3 ST. MARY'S L.J. 13 (1971).

[113]*See* note 138 and accompanying text *infra*; text accompanying notes 87 through 93 *supra.*

[114]See notes 9 through 11 and accompanying text *supra.*

[115]See notes 144 through 156 and accompanying text *infra.*

[116]See note 110 and accompanying text *supra.*

[117]Lowell, *supra* note 110, at 369.

[118]Alborg, *Application of the Securities Doctrine of Integration to Real Estate Syndicates,* 46 S. CAL. L. REV. 428, 431 (1973).

tions is the fact that 70 to 80 percent of the costs of the operation are usually deductible as intangible drilling costs.[119] In addition, if the well produces, the investor receives the percentage depletion allowance.[120] One instance in which the limited partnership has been used in this light is where the oil operator owns promising leases and sells shares to investors in order to drill a well.[121]

The problems an attorney will face when dealing with a limited partnership will be of two distinct kinds. First, the problems of one who is seeking to promote or organize a limited partnership. Second, the problems of those seeking to invest in a limited partnership offering. The remainder of this comment will focus on some of the prevalent problems in these areas.

1. Promoter Problems

Three areas where promoter problems are most frequently encountered when organizing a limited partnership are: ensuring tax treatment as a partnership, securing mortgage financing,[122] and avoiding securities regulations.[123]

a. Ensuring Taxation as a Partnership

As pointed out previously,[124] the main reason for utilizing the limited partnership is to secure the tax advantages indigenous to partnerships. It is therefore imperative to ensure that the business is treated as a partnership for tax purposes and not as an association taxable as a corporation. The Regulations list six characteristics of a corporation which are used to determine whether a business is an association taxable as a corporation or a partnership.[125] These characteristics are whether the business entity under consideration: (1) has associates; (2) has an objective to carry on a business and share the profits; (3) has a continuous life; (4) has centralized management; (5) provides limited liability for all of its members; and (6) allows for free transferability of interests in the organization.[126] Since the first two characteristics are common to

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[119]Tannenbaum, *supra* note 110, at 781; *see* INT. REV. CODE OF 1954, § 263(c). Thus, the losses sustained from a "dry well" can be passed directly to the limited partner for advantageous tax results.

[120]Tannenbaum, *supra* note 110, at 782; *see* INT. REV. CODE OF 1954, § 613.

[121]*Use of Partnerships in Mineral Operations*, 19 OIL & GAS TAX Q. 181 (1971).

[122]Andeel, *Use of Limited Partnerships in Real Estate Development*, 41 KAN. B. ASS'N J. 371 (1972).

[123]Sonfield, *supra* note 112, at 13.

[124]*See* note 106 and accompanying text *supra*.

[125]Treas. Reg. § 301.7701-2(a)(1) (1973); Pennell, *supra* note 88, at 337.

[126]*Id.*

both partnerships and corporations, only the last four are considered by the Internal Revenue Service in determining whether an entity is a partnership for tax purposes.[127] An unincorporated business will not be treated as an association taxable as a corporation unless it has more corporate than noncorporate characteristics.[128] Although the risk of being classified as an association taxable as a corporation is not great in Mississippi and other states that have adopted the ULPA, care should nevertheless be taken.[129]

In addition to the above tests under Section 301.7701-2(a) of the Treasury Regulations, there are additional requirements to be met when the sole general partner of a limited partnership is a corporation.[130] Since the limited partnership with a corporate general partner is one of the most flexible tools a lawyer can use in business planning,[131] special attention should be paid to these requirements, which are found in Revenue Procedure 72-13.[132] The Internal Revenue Service allows limited partnerships with corporate general partners to apply for an advance ruling to determine whether the business will be treated as a corporation or a partnership for tax purposes. The requirements, which are applicable only to a limited partnership with a *sole* corporate general partner, are: (1) that the limited partners not own more than 20 percent of the stock of the corporate general partner; and (2) that the net worth of a corporate general partner be the lesser of $250,000 or 15 percent of total contributions when those contributions are less than $2.5 million (the net worth is lowered to 10 percent of total contributions when contributions total more than $2.5 million).[133] It should be noted that an advance ruling on the requirements of Revenue Procedure 72-13 is no guarantee of success. This is true for a number of reasons. First, the courts are not bound by advance rulings, and are free to make their own determination of the law and regulations. Second, advance rulings pertain to the applicant only, and are not significantly persuasive as to cases involving other parties. Third, advance rulings may be revoked or modified at any time if it appears wise in the administration of the taxing statutes.[134] Finally, even with a favorable advance ruling, the

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[127]Treas. Reg. § 301.7701-2(a)(2) (1973); Pennel, *supra* note 88, at 338; Stein, *Partnership Taxation for the Limited Partnership with a Corporate General Partner*, 25 U. MIAMI L. REV. 435, 439 (1971).

[128]Treas. Reg. § 301.7701-2(a)(3) (1973).

[129]Pennell, *supra* note 88, at 337. This is because the ULPA has been designed to comply with the Treasury Regulations concerning taxation as a partnership.

[130]Rev. Proc. 13, 1972-1 CUM. BULL. 735; Pennell, *supra* note 88, at 343.

[131]Stein, *supra* note 127, at 435.

[132]Rev. Proc. 13, 1972-1 CUM. BULL. 735.

[133]*Id.*

[134]Rev. Proc. 3, 1972-1 CUM. BULL. 698.

requirements under Section 301.7701-2(a) of the Treasury Regulations must nevertheless be satisfied. Therefore, the only safe method of insuring taxation as a partnership is to have fewer corporate characteristics than partnership characteristics.[135]

Despite the vulnerability of even a favorable advance ruling, an investor should exercise extreme caution when investing in those limited partnerships which have not obtained one, particularly if the firm has tried and failed to get such a ruling.[136] The possibility of litigation is evident, and the attorney should be aware that this area of the law is somewhat unsettled.

b. Securing Mortgage Financing

In the section on tax advantages of limited partnerships, it was pointed out that both general and limited partners could take deductions only to the extent of their respective bases in the business.[137] The partners, then, must each have a basis which is larger than the realized losses in order to realize complete tax benefits. Unless the partner's actual cash equity in the business is large enough to cover the deductions, some type of device should be employed to increase his basis so as to allow him to make use of all the deductions. The best solution is to secure nonrecourse financing.[138] As stated in the section on tax advantages,[139] each partner may include in his basis a portion of any nonrecourse loan.[140] This addition to the basis is often very large since loans generally amount to 70 or 80 percent of the total costs in real estate limited partnerships.[141] The problem, however, is that nonrecourse loans are generally difficult to obtain, especially from local lenders.[142] Some solutions available are to: (1) secure a beginning recourse loan which can later be changed to a nonrecourse loan when sufficient capital has been raised; (2) persuade the lender to accept a guarantee of completion of the project; or (3) secure a two-part loan with one part being nonrecourse.[143]

The problems are much greater in the oil and gas area since there is usually only a mineral lease, and no land to secure the loan. Therefore, the partner's cash investment must be large enough to take advantage of all the deductions.

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[135]Pennel, *supra* note 88, at 338.
[136]Pircher, *supra* note 93, at 898.
[137]See notes 91 through 93 and accompanying text *supra*.
[138]Andeel, *supra* note 122, at 374.
[139]*See* part II *A supra*.
[140]See note 87 and accompanying text *supra*.
[141]Andeel, *supra* note 122, at 372-73.
[142]*Id.* at 374.
[143]*Id.* at 399.

c. Avoiding Security Regulations

Limited partnership interests are considered securities, and as such, will in some cases be regulated by federal and state security laws.[144] Of course the organizer of a limited partnership will want to avoid this regulation and the concurrent time and expense involved. In most cases this can be accomplished, as is evidenced by the fact that more than half of the offerings are not registered pursuant to the federal securities laws.[145]

Generally securities must be registered under Section 5 of the Securities and Exchange Act of 1933.[146] The purpose of the registration is to require complete disclosure of vital information relating to the investment risks and thereby protect unwary investors.[147] The registration can be avoided, however, by qualifying for one of the statutory exemptions. The three most commonly relied upon[148] are the private placement,[149] the intrastate sale,[150] and the regulation "A" exemptions.[151] The burden of establishing the applicability of an exemption is on the person claiming the exemption.[152]

In addition to the above-described federal regulation, the organizer must also be aware of state blue sky laws which may require registration with the state. There are different methods of regulation in the various states.[153] Mississippi, however, utilizes a registration approach similar to the federal law.[154] Since Mississippi exemptions are statutory, close attention should be paid to the statute when seeking to qualify as an exempt offering. Most offerings which are exempt in Mississippi fall under the private offering exemption which is available where there are 10 or fewer members in the business.[155] In addition, if a security is registered at the federal level, it is exempt from registration in Mississippi.[156]

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[144]Alborg, *supra* note 118, at 439-40.

[145]News release by William Casey at 7-8, Fourth Nat'l Real Estate Conference and Exposition, Sept. 28, 1972 ("Requirements of a National Market in Real Estate Securities"), *cited in* Alborg, *supra* note 118, at 428.

[146]15 U.S.C. § 77(e) (1970).

[147]*See* Alborg, *supra* note 118, at 440.

[148]For an examination of these exemptions see *id.* at 441-43. *See also* Patton, *The Private Offering: A Simplified Analysis of the Initial Placement*, 27 Bus. Law. 1089 (1972).

[149]15 U.S.C. § 77(d)(2) (1970).

[150]*Id.* § 77(c)(a[11]).

[151]*Id.* § 77(c)(b).

[152]*See* SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953); Alborg, *supra* note 118, at 44 n.60.

[153]D. Herwitz, Business Planning 249 (1966).

[154]Miss. Code Ann. §§ 75-71-1 to -57 (1972).

[155]*Id.* § 75-71-53(9).

[156]*Id.* § 75-71-51(7).

2. Investor Problems

Limited partnerships are organized through a process called syndication. Syndication is where two or more people at least one of whom has a passive interest in the investment, pool their resources in order to invest in a business venture.[157] The investor, in order to make a wise choice as to any investment in these operations, must be acquainted with the process of syndication and the problems incident thereto.

Syndications, or limited partnerships, may be promoted by a single individual who arouses interest or by large promoters, who may be corporations offering several syndications at a time. In the larger offerings promotion of the business is done through public advertising, sales personnel, brokers, or symposia and conferences.[158] The promoter will of course paint an alluring picture; but, it cannot be overemphasized that suspect business practices abound in this area,[159] and the investor should obtain all the facts before making any committment.

One of the reasons for abuses in the area is the number of sources of financial gain available to the promoter. The promoter may take a percentage of the business, a fee for his services, or both as compensation for his efforts in promoting the enterprise.[160] The problems grow more acute as the syndication increases in size since the promoter may be affiliated with subsidiaries who are shown favoritism in the awarding of contracts. For example, the promoter may own a construction company which is selected to develop the land which the limited partnership has acquired. This results in increased profits for the large corporate promoter, both at the construction company and the limited partnership levels.[161]

Another area of potential danger is where the large promoter owns land through a subsidiary which is sold to the limited partnership at an inflated price. Moreover, the large promoter can arrange to sell the property for the owner and receive a substantial broker's fee from the limited partnership.[162]

Guarantees of large promoters are also suspect. Although they may appear sound, many large promoters depend upon the repeated selling of limited partnership interests in order to provide financial stability and avoid collapse.[163]

The investor has good reason to be cautious, and he should obtain

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[157]Alborg, *supra* note 118, at 429.
[158]*Id.* at 432-34.
[159]*Id.* at 435-38.
[160]*Id.*
[161]*Id.* at 437-38.
[162]*Id.* at 437.
[163]*Id.* at 436-37.

all the facts before proceeding with the investment. The only sure way to gauge an investment is to know all the risks, and then to make a judgment on the soundness of the business venture. The prudent investor should know his management, and should not be swayed by guarantees or tax advantages alone.

Conclusion

The limited partnership is a valuable tool which can indeed be used by businessmen and investors to great advantage. It is hoped that this comment will aid the Mississippi attorney in making a decision as to the use of this practical investment vehicle. Finally, every attorney should realize that no amount of tax advantage or accelerated remuneration can be substituted for sound business judgment in the long run.

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RECENT DECISIONS

CONSTITUTIONAL LAW—EQUAL PROTECTION—PROVIDING SOCIAL SECURITY SURVIVOR'S INSURANCE BENEFITS TO WIDOWS BUT NOT WIDOWERS WHILE CARING FOR CHILDREN HELD UNCONSTITUTIONAL

The plaintiff, a widower, sought declaratory and injunctive relief against the Secretary of Health, Education, and Welfare for a denial of social security survivor's insurance benefits under 42 U.S.C. § 402(g) which allows widows but not widowers to collect benefits while caring for children.[1] The plaintiff contended that because the Social Security Act provision discriminated against widowers, women wage earners, and their children,[2] it violated the equal protection component of the fifth amendment.[3] The government contended that because women's present earning ability is less than men's, a greater burden is imposed on them to provide for their family's welfare after the death of their husbands; and since the statute is rationally related to the legitimate governmental purpose of rectifying the effects of past economic discrimination against women, equal protection is not violated. The three-judge District Court for the District of New Jersey, *held*, for the plaintiff. A Federal Social Security provision which denies survivor's insurance benefits to widowers but not to widows and which arbitrarily discriminates against women wage earners and their children violates the equal protection component of the fifth amendment.

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[1]The relevant portion of 42 U.S.C. § 402(g) (1970) provides:

Mother's Insurance Benefits

(1) The widow and every surviving divorced mother . . . of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother—

(A) is not married,

(B) is not entitled to a widow's insurance benefit,

(C) is not entitled to old-age insurance benefits . . . each of which is less than three-fourths of the primary insurance amount of such individual,

(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died,

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, ...

shall . . . be entitled to a mother's insurance benefit . . . .

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such individual . . . .

[2]The court permitted Wiesenfeld to assert his wife's constitutional rights. Wiesenfeld contended that although his wife made maximum social security contributions, her surviving spouse and child were denied benefits equivalent to that received by the surviving spouse and child of a male wage earner who had made similar contributions. Also, since Congress's purpose was to provide for families of deceased wage earners, dispersing benefits solely to women was arbitrary.

[3]U.S. CONST. amend. V. Equal protection requirements of the 14th amendment have been incorporated into the due process clause of the fifth amendment and made applicable to the federal government. Bolling v. Sharpe, 347 U.S. 497 (1954).

Wiesenfeld v. Secretary of Health, Education, and Welfare, 367 F. Supp. 981 (D.N.J. 1973), *appeal filed sub nom. Weinberger v. Wiesenfeld*, 42 U.S.L.W. 3703 (U.S. June 25, 1974) (No. 73-1892).

When our nation was founded, women were accorded an inferior legal status.[4] The effect of this status, together with traditional conceptions of the subordinate role of women, furthered deep and pervasive discrimination.[5] No significant assaults on women's legal status took place from the time of the adoption of the Federal Constitution until the beginning of the 20th century. During this period, however, the 14th amendment, which would have a significant impact on women's rights a century later, was passed prohibiting states from denying "to any person within their jurisdiction equal protection of the laws."[6] Despite the prohibition's language, states are allowed wide legislative discretion in enacting laws which treat some groups of persons differently from others.[7] Under the traditional and permissive equal protection standard of review, a statutory classification will bear a presumption of constitutionality[8] unless it is patently arbitrary,[9] or constitutes invidious discrimination,[10] or bears no rational relationship to a legitimate governmental purpose.[11] In determining the rational basis of a statute a court must determine the permissibility of the legislative purpose[12] and scrutinize the relationship of the purpose to the classification.[13] A court may conceive any reasonable justification to uphold a statutory classification.[14] The reasonableness of a classification depends, in a large measure, on

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[4]At common law women were largely considered a nonentity, and since common law served as a foundation for the Federal Constitution, the framers of the Constitution adopted an exclusively masculine liberty. *See* Crozier, *Constitutionality of Discrimination Based on Sex*, 15 BOSTON U.L. REV. 723, 723-24 (1935).

[5]*See generally* Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971); Cavanaugh, *"A Little Dearer Than His Horse": Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 260 (1971); Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131 (1968); Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965); Sedler, *The Legal Dimensions of Women's Liberation: An Overview*, 47 IND. L.J. 419 (1972).

[6]U.S. CONST. amend. XIV, § 1.

[7]McGowan v. Maryland, 366 U.S. 420, 425 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[8]*See, e.g.*, McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-09 (1969); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

[9]Allied Stores, Inc. v. Bowers, 358 U.S. 522, 527 (1959).

[10]Dandridge v. Williams, 397 U.S. 471, 487 (1970).

[11]Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Morey v. Doud, 354 U.S. 457, 464-65 (1957).

[12]*Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1081 (1969); *see, e.g.*, Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973); Allied Stores, Inc. v. Bowers, 358 U.S. 522 (1959).

[13]McLaughlin v. Florida, 279 U.S. 184, 191 (1965).

[14]Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356, 365 (1973); McGowan v. Maryland, 366 U.S. 420, 426 (1961).

treating equally all those who are similarly situated.[15] The traditional equal protection standard does not demand that a statutory scheme be mathematically exact;[16] hence, a statutory classification may be underinclusive and exclude some persons who are similarly situated with respect to the statutory purpose, or be overinclusive and affect persons not so similarly situated.[17] Such action is justified on the grounds that "[t]he Equal Protection Clause does not require that a . . . [legislature] must choose between attacking every aspect of a problem or not attacking the problem at all."[18] In *Muller v. Oregon*,[19] decided in 1908, classification on the basis of sex was upheld, and its purpose justified, because a woman's "physical structure and a proper discharge of performance of her maternal functions" required protection.[20] Later the Supreme Court, in *Goesaert v. Cleary*,[21] held that classification by sex is permissible,[22] even if underinclusive, when the classification is rationally related to the permissible legislative purpose of protecting women's morals. Similarly, lower courts, applying permissive review, have relied on the language in *Muller* and *Goesaert* to uphold laws which prohibited women from wrestling,[23] sitting on a jury,[24] and attending a university.[25] Equal protection requires the application of stricter scrutiny whenever a classification involves suspect criteria such as race,[26] alienage,[27] and national origin[28] or such fundamental interests as the right to vote,[29] travel,[30] procreate,[31] and appeal a criminal conviction.[32] Under strict

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[15]Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

[16]Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

[17]Tussman & tenBroek, *supra* note 15, at 351, 370; *see, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

[18]Dandridge v. Williams, 397 U.S. 471, 486-87 (1970); *see* Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955).

[19]208 U.S. 412 (1908).

[20]*Id.* at 422. *See also* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (due process).

[21]335 U.S. 464, 466 (1948). (Although recognizing legal and social advancements made by women, the Court refused to take them into consideration and noted that states may enact legislation treating men and women unequally.)

[22]*Accord*, Hoyt v. Florida, 368 U.S. 57 (1961) (women not taken for jury service unless name was on a jury list). *Contra*, Healy v. Edward, 363 F. Supp. 1110 (E.D. La. 1973) (invalidating state statute exempting women from jury service), *prob. juris. noted*, 415 U.S. 1405 (1974) (No. 73-759).

[23]*See, e.g.*, Calzadilla v. Dooley, 286 N.Y.S.2d 510 (Sup. Ct. 1968).

[24]State v. Hall, 187 So. 2d 861 (Miss. 1966).

[25]Heaton v. Bristol, 317 S.W.2d 86 (Tex. Civ. App. 1958), *cert. denied*, 359 U.S. 230 (1959).

[26]Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

[27]Graham v. Richardson, 403 U.S. 365 (1971).

[28]Hernandez v. Texas, 347 U.S. 475 (1954); Korematsu v. United States, 323 U.S. 214 (1944).

[29]Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[30]Shapiro v. Thompson, 394 U.S. 618 (1969).

[31]Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[32]Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

scrutiny the burden of proof is shifted to the government to show that it has a compelling interest in employing the classification[33] and that less burdensome, alternative means for carrying out the legislative goal do not exist.[34] Suspect classifications are characterized by a high degree of irrelevancy to legislative purpose and to one's ability to perform in society,[35] while constitutionally protected rights or important personal interests are denominated as fundamental.[36] Underinclusive and overinclusive classifications are less acceptable under strict scrutiny than under permissive review.[37] Further attempts to expand active review to other categories have been met with judicial reluctance.[38] In recent years, however, not only has sex been equated with discrimination as to race, color, and national origin,[39] but a gradual attempt has been made by lower

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[33]Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[34]McLaughlin v. Florida, 379 U.S. 184, 196 (1964); *see* Dunn v. Blumstein, 405 U.S. 330 (1972).

[35]*See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). The Court intimated what criteria are used to denominate suspect classifications:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness; the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28. *See also* Graham v. Richardson, 403 U.S. 365, 372 (1971) (strict scrutiny appropriate because aliens are a "discrete and insular minority"); Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (tendency of racial classifications to stamp racial minorities as inferior); Crozier, *Constitutionality of Discrimination Based on Sex*, 15 BOSTON U.L. REV. 723, 727-28 (1935) (parallel distinctions between race and sex); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1173 (1969) (racial classifications have no rational relationship to a person's capabilities); Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507 (1971) (high visibility of racial classifications).

When a classification is nearly suspect, that is, when it tends to exhibit some characteristics of suspectness, the burden of proof is placed upon the state to show that the classification bears a higher degree of relevancy to the purpose. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

[36]*See* notes 29-32 *supra*. *But see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1-17, 30-39 (1973) (only rights "explicitly or inexplicitly protected by the Constitution" are fundamental).

[37]*Compare* Williamson v. Lee Optical, Inc., 348 U.S. 483, 488-89 (1955) *with* Sei Fujii v. State, 38 Cal. 2d 718, 732-33, 242 P.2d 617, 627 (1952), *cited in Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1101 (1969).

[38]Frontiero v. Richardson, 411 U.S. 677 (1973) (the Court refused to declare sex as suspect although a plurality supported such action); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (wealth and education); Lindsey v. Normet, 405 U.S. 56 (1972) (decent shelter and peaceful possession); James v. Valtierra, 402 U.S. 137 (1971) (housing); Dandridge v. Williams, 397 U.S. 471 (1970) (welfare).

[39]Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a) (1970) (unlawful for any employer to discriminate on the basis of "race, color, religion, sex, or national origin"). *See generally Developments in the Law— Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971); Comment, *Civil Rights Act of 1964: An Exception to Prohibitions on Employment Discrimination*, 55 IOWA L. REV. 509 (1969).

courts to overcome precedents set by *Muller* and *Goesaert* by either declaring sex-based classifications invalid under the traditional equal protection test[40] or by declaring such classifications suspect.[41] The Supreme Court has also exhibited a gradual awakening to the inequities of sex classifications. In *Reed v. Reed*,[42] the Court for the first time held a state statute which treated women differently from men unconstitutional. The Court said that a classification must have a "fair and substantial relation" to the legislative objective and treat persons who are similarly situated equally.[43] The *Reed* decision has been held to create an intermediate equal protection test which shifts the burden of proof from the party attacking the statute to the party defending it, thereby placing on the defending party more than a mere showing of rationality which would satisfy the traditional test.[44] Although the Court in *Reed* avoided the opportunity to declare sex classifications suspect, a plurality of the Court's membership squarely faced this issue in *Frontiero v. Richardson*.[45] The plurality, noting this nation's "unfortunate history of sex discrimination" and recognizing Congres-

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[40]*See, e.g.*, Kirstin v. University of Va., 309 F. Supp. 184 (E.D. Va. 1970) (admission of women to university); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968) (unequal criminal sentencing of men and women).

[41]Andrews v. Drew Municipal Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973) (dismissal of teacher for bearing illegitimate child); United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968) (different criminal sentencing based on sex); Sailer Inn Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (women bartenders).

[42]404 U.S. 71 (1971). The Court invalidated a state statute which mandated an automatic preference of men over women who were members of the same entitlement class applying for appointment as administrator of a decedent's estate, although recognizing that furtherance of the statutory purpose of promoting efficiency and economy was "not without some legitimacy."

[43]*Id.* at 76.

[44]*See, e.g.*, Eslinger v. Thomas, 476 F.2d 225, 230-31 (4th Cir. 1973) (prohibition of women being employed as senate pages); Green v. Waterford Bd. of Educ., 473 F.2d 629, 633 (2d Cir. 1973) (requirement that pregnant teachers take a leave of absence); Aiello v. Hanson, 359 F. Supp. 792, 796-97 (N.D. Cal. 1973), *rev'd sub nom.* Geduldig v. Aiello, 94 S. Ct. 2485 (1974) (exemption of pregnancy-related work loss from insurance coverage). Other cases decided by the Supreme Court have supported an intermediate approach or a loosening of the strictures of mere rationality. *See* James v. Strange, 407 U.S. 128 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972). According to some commentators, the intermediate standard of equal protection requires not only that the means employed bear a rational relationship to the statutory goal, but they must effectuate the statutory objective in fact. *See* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974).

[45]411 U.S. 677 (1972) (presumption that spouses of male armed forces members are dependents for purpose of obtaining military benefits while presumption did not exist for spouses of female armed forces members). The respective opinions by all the members of the Court would indicate a continued vitality in shifting the burden of proof to the defending party to demonstrate the furtherance of a legitimate governmental interest through sex classifications.

sional concern for sexual equality, held that statutory classifications based on sex are inherently suspect and subject to strict judicial scrutiny.[46] In contrast to the plurality's ambitious decision in *Frontiero*, a majority of the Supreme Court in *Kahn v. Shevin*[47] resorted to an intermediate standard—containing some ingredients of permissive review—to hold that women can be treated differently from men in receiving certain legislative benefits where the statutory goal is designed to rectify past and present economic discrimination against women.

In the instant case, the court reasoned that since *Reed* and *Frontiero* did not evince a shift to an intermediate equal protection standard, the establishment of a new intermediate test would not be acceptable. The court postulated that under the traditional standard of equal protection the statutory provision was a rational attempt by Congress to provide for families of deceased male wage earners and that Congress's choice was not arbitrary because it helped rectify the effects of past and present discrimination against women; therefore, the court determined that it was necessary to decide whether the provision should be subjected to "close judicial scrutiny." Persuaded by Justice Brennan's opinion in *Frontiero* that sex is an "immutable characteristic" determined by

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[46]*Id.* at 684-88. Justice Brennan was joined by Justices Douglas, White, and Marshall. The plurality characterized sex, like race and national origin, to be an unchangeable characteristic which has no relation to one's ability to perform in society and which is easily employed as a method of discrimination. Although strict scrutiny was held to be applicable to sex classifications, the plurality did not assert that the government needed to show a compelling interest. In fact, there is implicit support in the plurality's opinion that if the Government could show that the measure furthered economy and efficiency in fact, strict scrutiny would be satisfied. *Id.* at 689. Concurring in the result on the basis of *Reed*, Justices Powell and Blackmun with Chief Justice Burger argued that the Court should abstain from holding that sex is a suspect classification, since the Equal Rights Amendment would decide that question if it were ratified by the states. *Id.* at 691-92.

The proposed 27th amendment to the Constitution provides in part: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." PROPOSED 27TH AMENDMENT TO THE U.S. CONSTITUTION, S.J. Res. 8, 92d Cong., 2d Sess., 118 CONG. REC. 4612 (daily ed. Mar. 22, 1972); H.R.J. Res. 208, 92d Cong., 1st Sess., 117 CONG. REC. 35782 (1971). Thirty-three of the required 38 state legislatures have ratified the Amendment. N.Y. Times, Mar. 20, 1974, at 6, col. 24.

[47]94 S. Ct. 1734 (1974). The Court upheld a state personal property tax exemption granted only to widows on the grounds that such an exemption is fairly and substantially related to the legislative goal of reducing disparities in economic capability between men and women. *Id.* at 1736. *Frontiero* was distinguished by the Court as involving statutes that increased economic discrimination suffered by women rather than mitigating such discrimination. *Id.* at 1736 n.8. Though the majority cited *Reed* as requiring a "fair and substantial" relationship between a classification and its purpose, ingredients of permissive review were implicitly included in the result. Because the question of whether the exemption should include women wage earners and minority groups and exclude wealthy widows was not confronted by the Court, underinclusion and overinclusion, which permeate permissive review, were allowed to seep into the intermediate test. Noting that only deferential standards of equal protection should be applied to taxation measures, the Court only required that a modicum of evidence be shown that economic disparities do exist. Whether the measure served to reduce economic discrimination against women in fact was not determined. Also, the majority opinion implicitly recognized that benign sex classifications are not subject to strict scrutiny.

birth which bears no relation to one's accomplishments or contributions to society, and since there is a tendency of invidious discrimination against females regardless of their capabilities,[48] the court concluded that sex is "inherently suspect." The court further noted that although Congress's intention to remedy the effects of past and present discrimination against women satisfies a compelling public interest, when viewed under the "strict scrutiny" standard the statutory provision compounds "economic disadvantages" which women wage earners experience. The court therefore concluded that the measure discriminated not only against widowers and children, but also against some of the members of the class whom it was intended to safeguard.

The instant decision is important because of its rejection of the intermediate equal protection test. The court's finding section 402(g) constitutional under the permissive test, but not under the active test, coupled with the court's perplexity over the result reached in *Reed* and the divided *Frontiero* opinion, may encourage the Supreme Court to explicate the workings of the intermediate test. Use of this equal protection middle ground has been anything but clear. Overlooking recognition accorded the intermediate test by other courts,[49] however, the instant court may have mistakenly assumed that *Reed* and *Frontiero* could not serve as a secure foundation for a new test. By failing to apply an intermediate test, the court may have avoided being forced to uphold the statute because of its futherance of a benign legislative objective.[50] Under an intermediate standard such as that used in *Kahn*, section 402(g) would be valid, even though it is underinclusive, if the statutory purpose is declared to be designed to rectify past and present effects of economic discrimination against women. Further, although men are treated differently, benefits would not necessarily need to be extended to them because they are not "placed by a statute into different classes on the basis of criteria wholly unrelated to the [statute's] objective"[51] of rectifying past and present discrimination against women. Yet if the statutory objective is viewed as providing for families of deceased wage earners, men and children would be directly discriminated against because they would then be similiarly situated with respect to the statutory purpose. On the other hand, it is arguable that the instant case can be distinguished from *Kahn* and likened to *Frontiero* because although the statutory objective may be designed to rectify economic discrimination against women, the provision heaps additional economic disadvantages on a woman wage earner who has social security payments deducted from her salary and yet her family is not permitted to share in her death benefits. Therefore, the question would still stand whether sex would need to be declared suspect.

The practical effect of the instant court's decision is logically to extend

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[48]Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973).

[49]*See* notes 44 & 45 *supra*.

[50]Kahn v. Shevin, 94 S.Ct. 1734 (1974). Justice Brennan had intimated in *Frontiero* that had the statute been "designed to rectify the effects of past discrimination against women" it probably would have been sustained. 411 U.S. 677, 689 n.22. *See* Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968) (sustaining more favorable computation of social security benefits for women than for men).

[51]Reed v. Reed, 404 U.S. 71, 75-76 (1971).

Reed and *Frontiero* by declaring sex a suspect classification. As the court recognized, sufficient justification exists to declare classifications based on sex inherently suspect.[52] Sex, a visible characteristic over which an individual has no control, can be readily employed in making broad generalizations. Historically used as a means of discrimination, sex characteristics are generally irrelevant to a person's ability. Though women constitute the majority of our population, their viability as a major political force is relatively weak. Declaring sex a suspect classification is an important step in promoting sexual equality. Existing laws[53] founded on stereotyped roles of the sexes would be subject to a presumption of unconstitutionality unless it could be shown that such laws were grounded in terms of functional differences[54] and furthered a compelling governmental interest. Interminable delay and political battles caused by applying political pressure on states and the federal government to revise or repeal existing laws that discriminate on the basis of sex could be avoided. On the other hand, the Supreme Court's reluctance to declare sex as suspect until the states have taken action on the Equal Rights Amendment may be appropriate because the Court has been burdened by criticism of its inclination to overreach in the area of social reform. If the Equal Rights Amendment passes, it will be the Court's responsibility to interpret the legislative history of the amendment and to determine what judicial standard to apply. Proponents of the Equal Rights Amendment assert that the measure is clothed with an absolutist character which will prohibit all legislative or administrative classification on the basis of sex, even though the classification may be benign or justified by a compelling governmental interest.[55] If the legislative history is unclear or the amendment fails to pass, the Court must resort to its own judgment. The Court, therefore, should not hesitate on the issue of sexual equality under equal protection simply because Congress has taken the initiative. In the absence of a clear legislative history, the Court might be guided by the applications of strict scrutiny to sex classifications by lower courts, including the instant court, in order to lay a foundation for interpretation of the Equal Rights Amendment.[56]

John David Duffus, Jr.

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[52]Frontiero v. Richardson, 411 U.S. 677, 682-88 (1973).

[53]*See* Sedler, *The Legal Dimensions of Women's Liberation: An Overview*, 47 IND. L.J. 419 (1972).

[54]*See* Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131 (1968).

[55]Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 892-93, 904 (1971).

[56]Stern v. Massachusetts Indem. & Life Ins. Co., 365 F. Supp. 433, 442 (E.D. Pa. 1973); *cf.* Brenden v. Independent School Dist., 477 F.2d 1292, 1297 (8th Cir. 1973) (holding strict scrutiny applicable if sex classification found valid under intermediate test); Ballard v. Laird, 360 F. Supp. 643, 647-48 (S.D. Cal. 1973), *prob. juris. noted sub nom.* Schlesinger v. Ballard, 415 U.S. 912 (1974) (No. 73-776).

CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—FIRST AMENDMENT GIVES NEWSMEN LIMITED RIGHT OF ACCESS TO THE NEWS OF STATE GOVERNMENT

The plaintiffs[1] filed a class action suit[2] in the United States District Court for the Middle District of Alabama[3] to invalidate a section of that state's 1973 ethics statute[4] and to enjoin the defendant[5] from enforcing it. The plaintiffs alleged that an economic disclosure requirement[6] would seriously impede certain newsmen's access to public news sources. The defendant contended that two compelling state interests—protecting the public from "improperly influenced news coverage" and protecting the legislature from "surreptitious lobbying newsmen"—justified the denial to certain newsmen of the right of entry to public legislative sessions and press areas. The three-judge federal court, *held*, that the regulation was unconstitutional on its face and issued an injunction

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[1]Plaintiff Jesse J. Lewis owns and publishes the Birmingham (Ala.) Times. Plaintiff National Democratic Party of Alabama is an association incorporated and doing business under Alabama law and is the publisher of the Eagle Eye. The Alabama chapter of Sigma Delta Chi, professional journalism society, intervened as plaintiff.

[2]Plaintiffs sought individual and collective relief for members of a class composed of newsmen affected by ALA. CODE tit. 55, § 327(21) (Supp. 1973). The claim was based on 42 U.S.C. § 1983 (1970) and brought under FED. R. CIV. P. 23(b)(2).

[3]Jurisdiction was predicated on 28 U.S.C. § 1343(3) (1970) and a three-judge federal court empaneled pursuant to 28 U.S.C. § 2281, 2284 (1970).

[4]ALA. CODE tit. 55, § 327(21) (Supp. 1973) provides:

> Members of the press who cover the state legislature or state government in any way, either as a member of an editorial staff or through direct reporting, prior to being admitted to galleries, pressrooms, committee meetings, any space set aside for use of the press, the floor of the legislature, or press conferences by a member of the legislature or a government official, shall file a statement of economic interest in accordance with the provisions of this chapter at the office of the State ethics commission and shall have been approved by the State ethics commission for a special press pass and shall be subject to the provisions of the chapter. The statement of economic interest filed by members of the press shall further include the names of all newspapers or publications, radio stations, television stations, or newsgathering organizations by which they are employed, and what other occupations or employment they may have, if any; and they shall further declare that they are not employed in any legislative or executive department of government, and that they are not employed, directly or indirectly, by any person or corporation having legislation before the state legislature, and that they will not become so engaged in any of these activities while covering the state legislature or state government.

[5]Alabama Attorney General William Baxley was sued together with those state officials empowered to enforce the ethics statute.

[6]The offending portion of the ethics statute denied newsmen entry to public and press areas of the state legislature and to press conferences of state officials unless the newsmen filed a declaration: (1) giving all current employment, including both news-related and non-news occupations; and (2) pledging that they are neither directly nor indirectly employed by anyone having legislation pending before the state legislature, and will not become so employed while covering state government. *See* note 4 *supra*.

against its enforcement. Where state government grants the press access to public galleries, press rooms, press conferences dealing with state government, and the legislative floor so that the press may report on governmental affairs, individual journalists have a limited first amendment right of reasonable access to these areas and to news of state government. *Lewis v. Baxley*, 368 F. Supp. 768 (M.D. Ala. 1973).

Historically a reporter's right of access to legislative proceedings has been regarded as a privilege rather than a right. In early England, reporters were able to gain access to the House of Parliament only through connivance. Even after their attendance was tolerated, news reporters underwent an arduous struggle before gaining any substantive reporting privileges.[7] In the United States, since ratification of the Federal Constitution, Congress and the various state legislatures, while retaining the prerogative to meet in secret session when necessary, have held their sessions open to the public either out of custom or as a matter of right.[8] In the past, Congress established regulations dealing with news correspondents' reporting privileges.[9] Today, however, under the auspices of the Senate Committee on Rules and Administration and the Speaker of the House, regulations dealing with the right of access to congressional press functions[10] are formulated by a standing committee composed of reporters holding press credentials to cover the Houses of Congress. The access to facilities which the federal or state government provides reporters to aid their efforts in covering governmental activities has been regarded as a privilege in which reporters may

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[7]Up until 1771, reporters were punished severely when they published summaries of the debates. Reporters could be removed by order of a single member of either House until 1875. Reporters' galleries were not provided until 1835 and reporters were prohibited from taking notes of the proceedings until the mid-19th century. T. Pitt & T. Langmead, English Constitutional History 719-26 (9th ed. 1929).

[8](1) *Federal*: Both Houses of Congress have rules which deal with meeting in secret or executive session. These rules are primarily concerned with the consideration of confidential communications from the President (House and Senate) or foreign treaties and certain nominations (Senate). Manual and Rules of the House of Representatives, H.R. Doc. No. 384, 92d Cong., 2d Sess. 529 (1973). Rules and Manual of the United States Senate, S. Doc. No. 93-1, 93d Cong., 1st Sess. 53-59 (1973). The House has met publicly since 1792 and the Senate since 1794. F. Thayer, Legal Control of the Press 35-36 (3d ed. 1956).

(2) *State*: Thirty-four state constitutions require the legislature to meet publicly. In Idaho and New Mexico the requirement is absolute. The other state legislatures may meet in executive session. H. Cross, The People's Right to Know 182-84 (1953); F. Thayer, *supra* at 39-40.

[9]Most of the problems appear to have arisen while the seating provided for reporters was on the legislative floor and lobbyists under the guise of reporting attempted to gain seats. *See, e.g.*, Cong. Globe, 32d Cong., 2d Sess. 52 (1852).

[10]Rules and Manual of the United States Senate, S. Doc. No. 93-1, 93d Cong., 1st Sess. 52-53 (1973); Manual and Rules of the House of Representatives, H. R. Doc. No. 384, 92d Cong., 2d Sess. 535-39 (1973); Joint Comm. on Printing, 93d Cong., 2d Sess., Congressional Directory, 842-43, 881-82, 894-95, 910-11 (1974).

claim no substantive right.[11] In 1965, however, in *Kovach v. Maddux*,[12] a legislature's revocation of a newspaper's reporting privileges on the floor because of its representative's refusal to leave a closed committee meeting was held to be an infringment upon the newspaper's first amendment rights. The reporter presented no direct, serious threat to the legislative proceedings and other methods of punishment not infringing upon first amendment rights were available.[13] No other cases dealing with a reporter's right of access to legislative proceedings arose until 1973. In *Consumers Union of United States, Inc. v. Periodical Correspondents' Association*,[14] the United States District Court for the District of Columbia held that where regulations prohibit some members of the news media from gaining access to press functions and press facilities provided by the federal government, the regulations must be narrowly drawn, the prohibition must be based on some compelling federal interest, and, before permanent exclusion, due process must be provided through "adequate impartial review."[15] *Consumers Union* was the first case where a reporter's access to legislative proceedings was characterized as a right receiving the protection of the first amendment rather than a privilege.[16] However, not all courts have recognized this right. In *Sigma Delta Chi v. Speaker*,[17] the Maryland Court of Appeals held that the exclusion of a news reporter's tape recorder from the state legislative session was not an abridgment of first amendment rights. The argument that the first amendment envelopes a right to gather news has received the attention of legal writers and the courts only within the last 25 years.[18] The right to gather news is said to be logically antecedent to the right to publish and therefore should be considered within the ambit of the first amendment.[19] Most of the

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[11]In the past, Congress has revoked a reporter's privileges for attempting to influence the passage of a bill and has imprisoned a reporter for the publication of a foreign treaty being considered in executive session. A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 355, 59th Cong., 2d Sess. §§ 1634, 1638, 1640 (1907).

[12]238 F. Supp. 835 (M.D. Tenn. 1965), *noted in* 79 HARV. L. REV. 681 (1966).

[13]The court used both "clear and present danger" and "less drastic means" as standards of review in determining that the legislature's revocation of the publication's reporting privileges infringed upon its first amendment rights. 238 F. Supp. at 844-46.

[14]365 F. Supp. 18 (D.D.C. 1973).

[15]*Id.*

[16]Whether the grant of access to gather news is characterized as a right or a privilege, however, is of small constitutional import today. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[17]270 Md. 1, 310 A.2d 156, 159 (1973) (Speaker's rule necessary to maintain "order and decorum" during legislative sessions).

[18]Before this period the courts occasionally intimated that the first amendment protected the right to gather news. *See* Associated Press v. KVOS, 80 F.2d 575, 581 (9th Cir. 1935), *rev'd on other grounds*, 299 U.S. 269 (1936); United States v. Dickey, 3 F.2d 190 (D. Mo. 1924), *aff'd*, 268 U.S. 378 (1925). For an excellent treatment of the issue, see Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971).

[19]The Court has especially protected those rights within the first amendment which lead to a higher degree of participation in, and knowledge of, political issues and which, theoretically at least, result in a correspondingly high degree of self-government. While true self-government is an ideal, the first amendment is one of the tools by which this ideal

legal writers have dealt with the right to inspect public records or the right to attend meetings of public officials.[20] Legislation on both the federal and state level has been the principal means used to grant private citizens greater access to public records and to the meetings of public officials.[21] The courts have

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may be achieved. *See* Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245.

The Court has given greater efficacy to the concept of self-government through other means:

(1) *Right to Vote*—Kusper v. Pontikes, 414 U.S. 51 (1973) (23-month anti-raiding statute for primary elections invalid); Goosby v. Osser, 409 U.S. 512 (1973) (absolute disenfranchisement of pretrial detainees invalid); Dunn v. Blumstein, 405 U.S. 330 (1972) (1-year residency requirement invalid); Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (invalid restriction of franchise in special election); Evans v. Cornman, 398 U.S. 419 (1970) (residency requirement invalid); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (state poll tax invalid); Reynolds v. Sims, 377 U.S. 533 (1964) (one person, one vote); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (racial gerrymandering invalid).

(2) *Right of Access to the Ballot*—Lubin v. Panish, 94 S. Ct. 1315 (1974) (filing fees with no alternative means to ballot invalid); American Party v. White, 94 S. Ct. 1296 (1974) (state minority-party elections laws upheld); Storer v. Brown, 94 S. Ct. 1274 (1974) (state independent candidate laws upheld); Bullock v. Carter, 405 U.S. 134 (1972) (excessive statutory filing fees invalid); Williams v. Rhodes, 393 U.S. 23 (1968) (third-party petition requirements invalid).

(3) *Opening of Public Forums*—Police Dep't v. Mosley, 408 U.S. 92 (1972) (discriminatory picketing ordinance); Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black, J., concurring) (discriminatory picketing ordinance); Niemotko v. Maryland, 340 U.S. 268 (1951) (arbitrary licensing of park facilities); Bonner-Lyon v. School Comm., 480 F.2d 442 (1st Cir. 1973) (public school distribution system).

(4) *Interchange and Discussion of Public Issues*—Flowers v. United States, 407 U.S. 197 (1972) (handbilling in public streets of military base protected); New York Times, Co. v. United States, 403 U.S. 713 (1971) (publication of Pentagon Papers); Cohen v. California, 403 U.S. 15 (1971) (breach-of-the-peace conviction for vulgar phrase on clothing invalid); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (FCC's equal time rule upheld); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (right to receive communist literature in the mails); New York Times, Co. v. Sullivan, 376 U.S. 254 (1964) (political libel); Woods v. Georgia, 370 U.S. 375 (1962) (improper contempt citation for criticism of judicial proceedings).

[20]H. CROSS, *supra* note 8, at 122-32; F. THAYER, *supra* note 8, at 162-66; Parks, *The Open Government Principle: Applying the Right To Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); Yankwich, *Legal Implications of, and Barriers to, the Right to Know*, 40 MARQ. L. REV. 3 (1956); Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209 (1952).

[21](1) *Federal*: The Freedom of Information Act, adopted in 1966, entitles private citizens to receive information from federal administrative agencies unless the information falls within specific exempted categories. 5 U.S.C. § 552 (1970). For an analysis of the statute's efficacy, see Note, *Developments Under the Freedom of Information Act—1972*, 1973 DUKE L.J. 178.

(2) *State*: A majority of states have enacted "open meeting, open record" statutes. *See* Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199 (1962).

regarded these matters as a political function best left to the legislature.[22] In other areas, however, the courts have recognized a limited first amendment right to gather news within the confines of the law. The first amendment does not immunize reporters from civil or criminal liability;[23] nor does it give reporters an unrestricted right to travel abroad in search of the news.[24] Reporters may be temporarily restrained from gathering news in hazardous areas where public safety is of greater importance.[25] Photographing or filming the events in a federal court are prohibited although the news media retains the right to report the events of a trial.[26] Any undue interference with the news media's right to gather news and take photographs in public places, however, is an abridgment of their first amendment rights.[27] Furthermore, while reporters generally have no greater right than other private citizens to inspect public records,[28] when public officials allow some reporters to inspect public records, the courts have held other reporters must be allowed the right of inspection.[29] Most of the significant cases dealing explicitly with the first amendment right to gather news have occurred since *Branzburg v. Hayes*.[30] In that case the Supreme Court balanced the first amendment argument for a reporter's privilege against the compelling state interst in

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[22]Courier-Journal & Louisville Times Co. v. Curtis, 335 S.W.2d 934 (Ky.), *cert. denied*, 364 U.S. 910 (1960); Dayton Newspapers, Inc. v. City of Dayton, 23 Ohio Misc. 49, 52 Ohio Op. 2d 100, 259 N.E.2d 522 (Montgomery County C.P.), *aff'd*, 28 Ohio App. 2d 95, 57 Ohio Op. 2d 170, 274 N.E.2d 766 (Ct. App. 1971); *see* Henkin, *The Right To Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271 (1971). *Contra*, Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749 (1928); *accord*, State *ex rel.* Charleston Mail Ass'n v. Kelly, 149 W. Va. 766, 143 S.E.2d 136 (1965).

[23]Dieteman v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Varnish v. Best Medium Publishing Co., 405 F.2d 608 (2d Cir.), *cert. denied*, 394 U.S. 987 (1968); Galella v. Onassis, 353 F. Supp. 196 (S.D.N.Y. 1972), *modified*, 487 F.2d 986 (2d Cir. 1973).

[24]But when stating this proposition, the courts cite Zemel v. Rusk, 381 U.S. 1 (1965), which upheld the Secretary of State's right to refuse to issue Zemel a passport to Cuba on the basis of foreign policy considerations. The Secretary of State, though, reserved the right to grant passports to "newsmen or businessmen with previously established business interests." The appellant, however, was a member of neither class. *Id.* at 3. Worthy v. Herter, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959).

[25]Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634 (D. Minn. 1972); *cf.* Branzburg v. Hayes, 408 U.S. 665, 685-86 (1972) (*semble*).

[26]18 U.S.C. § 53 (1970); *cf.* Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973); Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3rd Cir. 1958). For decisions on the state level, see Carter v. State, 99 Miss. 435, 54 So. 734 (1911) *In re* Mack, 386 Pa. 251, 126 A.2d 679 (1956).

[27]Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Dayton Newspapers, Inc. v. Starick, 345 F.2d 677 (6th Cir. 1965); Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634 (D. Minn. 1972).

[28]*E.g.*, McMullan v. Wohlgemuth, 453 Pa. 147, 308 A.2d 888, 895 (1973). *But see* Nowack v. Fuller, 243 Mich. 200, 219 N.W. 749 (1928).

[29]McCoy v. Providence Journal Co., 190 F.2d 760 (1st Cir. 1951); Quad-City Community News Serv., Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971).

[30]408 U.S. 655 (1972).

effective criminal investigation and determined that the reporter's first amendment right to withhold confidential sources was outweighed by the compelling state interest involved.[31] The *Branzburg* decision has been held applicable to criminal trials also.[32] In civil actions, however, where the testimony sought did not go to "the heart of the claim," two federal courts making use of the balancing test have recognized a qualified reporter's privilege based upon a limited first amendment right to gather news.[33] Finally, in applying *Branzburg*, the Supreme Court has held that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."[34]

In the instant decision,[35] the court found that section 327(21) would substantially impede reporters' efforts in covering state governmental activities, and thereby directly limit the content of the news. The court reasoned that for a free press to maintain its vitality, the right to publish must include a right to gather news for publication. Citing *Consumers Union of United States, Inc. v. Periodical Correspondents' Association*[36] as explicity acknowledging a reporter's right of access to the news of the federal government, the court noted that *Consumers Union* presented a fact situation similar to the instant case. The court, however, found that the present case constituted an even greater threat to the reporters' right of access to news. Here, upon a reporter's failure to comply with the statute's requirements, exclusion from state government activities was complete, whereas in *Consumers Union* a reporter denied press credentials retained the right to sit in the public galleries of Congress. Accordingly the court

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[31]When applying the first amendment balancing test, a court determines whether compelling governmental interests manifested in legislation outweigh the importance of the first amendment activity and the manner in which it is restrained. The test is applied to indirect limitations of first amendment rights as opposed to direct limitations upon the content of speech. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. (1965). *Compare* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962), *with* Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr. Frantz*, 17 VAND. L. REV. 479 (1964).

For examples of the balancing process, see United States v. O'Brien, 391 U.S. 367, 376-82 (1968); Sherbert v. Verner, 374 U.S. 398, 406-09 (1963); Konigsberg v. State Bar, 366 U.S. 36 (1961).

[32]United States v. Liddy, 354 F. Supp. 208 (D.D.C. 1972).

[33]Garland v. Torre, 259 F.2d 545(2d Cir.), *cert. denied*, 358 U.S. 918 (1958). *Compare* Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974), *with* Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972). *Contra*, Dow Jones & Co. v. Superior Court, 303 N.E.2d 847 (Mass. 1973).

[34]Pell v. Procunier, 94 S. Ct. 2800, 2810 (1974); *accord*, Saxbe v. The Washington Post Co., 94 S. Ct. 2811 (1974).

[35]The court made no finding whether the plaintiffs, deprived of their first amendment right to gather news by section 327(21), were denied due process and equal protection as guaranteed by the 14th amendment of the United States Constitution. The court appears to regard the balancing test as an adequate means of safeguarding the reporters' first amendment right to gather news under the due process clause and the equal protection clause. This utilization of the balancing test as a standard of review is significantly different from the standard set forth by the District Court for the District of Columbia. *See* text accompanying note 15 *supra*.

[36]365 F. Supp. 18 (D.D.C. 1973).

held that reporters have a limited first amendment right of access to the news of state government activities. The court then explained that where legislation inhibits first amendment rights, those rights are balanced against the government's interest in adopting the legislation. The court noted that the state must establish both a compelling interest and a substantial nexus between the state interest and its regulation of the first amendment right. The court determined that shielding the public from biased news coverage of government affairs was not a compelling state interest and that requiring every reporter to make a financial disclosure and a nonpartisan declaration in the belief that some reporters are lobbyists has an insufficient nexus to the state's interests in identifying lobbyists.[37] The court concluded that the regulation abridged reporters' first amendment right of reasonable access to the news of state government.

In his dissenting opinion, Judge Varner argued that since the Ethics Bill contained a severability clause, a portion of the statute could be upheld.[38] He concluded that since reporters could not be excluded from gathering news on the basis of their associational ties or personal beliefs, the nonpartisan declaration clause was unconstitutional. He asserted, however, that the financial disclosure clause should be preserved because the state has a valid interest in knowing the economic resources of those having frequent occasion to affect state legislation.

The instant decision is consistent with efforts by other lower courts[39] to protect and expand the reporter's first amendment right to gather news in the wake of *Branzburg v. Hayes.* [40] The court correctly recognizes that to permit the state to establish unreasonable standards which exclude some reporters from vital sources of governmental news is to allow the state an inroad into managing the content and quality of news disseminated to the public about state affairs.

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[37]The court concluded that since the requirement of a substantial nexus includes a mandate for the usage of the least restrictive means of attaining the asserted governmental end, and since Alabama can more narrowly regulate lobbying than by exacting detailed disclosures from the press, requiring newsmen as a class to file economic interest statements bears no substantial relationship to the admittedly paramount state interest in the control of lobbying. In dictum, the court stated that it would require merely a *reasonable* nexus for the restriction if the areas in controversy were closed to both the public and the press. The court suggested that Alabama could constitutionally control lobbying newsmen by requiring disclosures of all lobbyists rather than singling out newsmen. The court emphasized that persons engaged in the dual role of reporter-lobbyist would not be immune from the appropriate lobbying statutes and took notice of Alabama's statutes which dealt inclusively with controlling lobbying. *See* ALA. CONST. art. 4, § 101; ALA. CODE tit. 14, §§ 352, 353 (1958).

[38]The majority opinion stressed that it was not a federal court's function to construe state statutes narrowly. The dissenting opinion's arguments for striking the declaration clause and upholding the disclosure clause, however, would conceivably give greater protection to a reporter's first amendment right to gather the news than the majority opinion did.

[39]Cases cited notes 12, 14, 32, 33 *supra*; Borreca v. Fasi, 369 F. Supp. 906 (D. Hawaii 1974).

[40]408 U.S. 665 (1972). After *Branzburg*, the reaction of most commentators was that the Court had stripped newsmen of a valuable tool in the news gathering process. *See, e.g.*, Note, *Has Branzburg Buried the Underground Press,* 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 181 (1973); 41 FORDHAM L. REV. 1024 (1973).

Yet the balancing test which was used by the court is not suited for adjudging a problem involving state control over public issues. Regardless of how compelling the interest in adopting legislation which prevents a reporter's right of access to state press facilities, the effect is ultimately the same: the state is regulating the news which the public receives about government activities. By applying the balancing test in the instant decision, the court does not appear to recognize this contradiction. Moreover, the dilemma is compounded by the method in which the court applies the balancing test. In *Consumers Union* the court held that once regulations dealing with a reporter's right of access to federal press facilities are deemed sufficient under the balancing test, due process of law must be provided through "adequate impartial review"[41] before a reporter can be permanently denied press credentials. Under the instant court's application of the balancing test, substantive due process relating to every reporter's first amendment right of access to the news is raised, considered, and satisfied within a single regulatory statute. In other areas where the reporters' right to gather news was raised and the balancing test was applied to weigh the competing interests involved, the situation was dissimilar to the instant case because the benefits which society would receive were of a problematic nature.[42] The government's interest in preserving an ordered society through prudent criminal investigatory procedures or its interest in maintaining security and discipline in its prisons may at times legitimately outweigh the interest in concealing the identity of a particular informant or the interests in gaining an interview with a particular felon. The primary value of applying the balancing tests in these situations is that it is recognized initially that competing societal interests are being considered and that proper deference must be given to both during the balancing process.[43] In regard to a reporter's right of access to the news, however, it is difficult to discern the benefits society might receive from the blanket exclusion of a certain group of reporters from government press areas. Far from being of a problematic nature, the benefit which society receives from allowing all reporters the right of reasonable access to government press areas is correlative to the spectra of views which the reporters ultimately express about governmental policies and practices. This is not a matter in which societal interests should be regarded as competing against each other. Differences in public opinion were not intended to be weighed under the balancing test. Such determinations should be made by society itself as it picks and chooses for itself in the market place of ideas and not by allowing the government to manage the news by excluding a group of reporters from its press areas because of an interest it deems compelling. The press must not be inhibited by unreasonable governmental harnesses if it is to exercise its unique role in informing the public about governmental affairs. This republic's purpose is not to manage or control its citizens' lives. The government is an agent created to fulfill the needs and wishes of the citizenry and it is best directed by an informed electorate attempting an

[41]365 F. Supp. 18, 26-27 (D.D.C. 1973).

[42]For a discussion of this point, see Branzburg v. Hayes, 408 U.S. 665, 693-99 (1972).

[43]S. KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM 108-15 (1968).

exercise in true self-government.[44] To recognize that the news gathering process receives the protection of the first amendment is to acknowledge that certain conduct and action on the reporter's part are provided constitutional protection. Sweeping assertions as to what forms of the news gathering process are or are not protected are unnecessary. Interstitual adjudication is the best method of approaching these matters and the balancing test is well-suited for weighing the conflicting societal interests in whatever form they may arise. Yet where the first amendment right of access to government news is involved, by the very act of providing press areas and permitting access to those areas, the government sanctions reasonable conduct by the reporters as they report the news. In a very real sense what the government provides is a public news shop from which reporters' views and ideas about various government issues are disseminated to the public.[45] Ultimately the public's views about these issues are shaped and colored by the predisposition of each reporter. Because of this, no compelling governmental interest should be regarded as outweighing what is at stake. Once the government permits reporters into its public news shops, it is not the government's function to select among reporters on the basis of the publication they represent or on the basis of what they may or may not believe.[46] Finding that reporters have a first amendment right of access to press facilities offered by the government substantially transforms the nature of the case before the court. A state regulation prohibiting a reporter's right of access does not simply limit the reporter's first amendment rights, but directly contravenes these rights. This is not to say that regulations necessary to preserve the integrity of the physical and social order to the governmental process are not applicable to news reporters. Such regulations, however, should apply evenly to all who play a role in the governmental process, they should serve some imperative purpose that is significant to the governmental process, and they should not be designed to prohibit a particular group's right of access. Before a reporter may be prohibited access permanently, he should be granted a hearing before an impartial forum where the burden is upon the state government to justify its reasons for refusing access on the basis of clear and convincing evidence.[47] In holding that a limited first amendment right of access to government news exists, the instant court recognizes the genesis of a new first amendment right. If it is not limited through the mechanical application of existing, inappropriate standards of review, this first amendment right will be elevated to a constitutional level consonant with the goals and purposes of effective self-government.

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[44]*See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); Meiklejohn, *The First Amendment Is An Absolute,* 1961 SUP. CT. REV. 245; Richardson, *Freedom of Expression and the Function of Courts,* 65 HARV. L. REV. 1 (1951).

[45]*Cf.* Bonner-Lyons v. School Comm., 480 F.2d 442, 443 (1st Cir. 1973).

[46]*Id.* at 444; National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1015 (4th Cir. 1973) (en banc); U.S. v. Crowthers, 456 F.2d 1074, 1078 (4th Cir. 1972); *cf.* Police Dep't. v. Mosley, 408 U.S. 92, 99-100 (1972).

[47]*See* Healy v. James, 408 U.S. 169 (1972).

Divorce—Habitual Cruel and Inhuman Treatment—Absence of Proof That Defendant's Conduct Was Proximate Cause of Separation Precludes Granting Divorce Absolute on Ground of Habitual Cruel and Inhuman Treatment

Dr. Harrison brought an action against his wife for divorce alleging habitual cruel and inhuman treatment.[1] This treatment consisted of his wife's allegedly false accusations, made directly to him as well as to others, that he had been engaging in adulterous activities. Dr. Harrison alleged that this treatment, accompanied by his wife's nagging and quarreling, impaired his health.[2] Mrs. Harrison, who had voluntarily left the complainant, alleged that she made the accusations only to him, without malicious intent, and for the purpose of ending his adulterous activities.[3] The chancellor granted Dr. Harrison a divorce absolute. On appeal to the Supreme Court of Mississippi, *held*, reversed.[4] In a divorce action on the ground of habitual cruel and inhuman treatment, the complainant must prove that the treatment by the defendant was the proximate cause of the separation. *Harrison v. Harrison*, 285 So. 2d 752 (Miss. 1973).

The law of Moses vested a husband with the absolute power to divorce his wife.[5] Prior to the ascendancy of Christianity , early Jewish law embraced the theory that divorce should be granted for any cause shown.[6] Under early Roman law, a divorce in the form of a private action could be obtained by the will of either spouse or by mutual consent, thereby obviating resort to a court of justice.[7] Similarly, Anglo-Saxon law recognized divorces obtained by mutual consent as well as divorces based on adultery or desertion by the wife.[8] Following the Norman Conquest of England, the Norman parliament transferred exclusive jurisdiction over divorce from the lay courts to the ecclesiastical courts. Conse-

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[1]Miss. Code Ann. § 93-5-1 (1972) provides: "Divorces from the bonds of matrimony may be decreed to the injured party for . . . [h]abitual cruel and inhuman treatment."

[2]According to the court, in a divorce action on this ground, the complainant has the burden of proving by clear and convincing evidence: (1) that the defendant's conduct amounted to habitual cruel and inhuman treatment; (2) that the conduct "endangered or adversely affected" the complainant's health; and (3) that the conduct "was the proximate cause of the separation." Harrison v. Harrison, 285 So. 2d 752, 754 (Miss. 1973). *But cf.* Wires v. Wires, No. 47, 588 (Miss. Sup. Ct. July 29, 1974) (habitual cruel and inhuman treatment may be established by a preponderance of the creditable evidence).

[3]Conflicting testimony relating to the charge of adultery was resolved in Dr. Harrison's favor. *Id.* at 753.

[4]Disposition of Mrs. Harrison's assignment of errors was as follows: (1) as to error in granting divorce absolute to the complainant, reversed; (2) as to the dismissal of her cross-bill and the denial of alimony and the decree for divorce in her favor, affirmed; (3) as to error in the denial of the award to her for counsel fees in prosecution of cross-bill, reversed and remanded. *Id.* at 755.

[5]*Deuteronomy* 24:1. *Contra, Mark* 10:9.

[6]O. Warren, Schouler Divorce Manual § 1(b) (1944).

[7]J. Morland, Keezer on the Law of Marriage & Divorce § 240 (3d ed. 1946) [hereinafter cited as Morland].

[8]H. Clark, Law of Domestic Relations § 11.1, at 281 (1968) [hereinafter cited as Clark].

quently, decrees were restricted to divorces *a mensa et thoro*,[9] a form of divorce which effectuated a separation that precluded remarriage by either party, but which did not constitute an absolute dissolution of the marital bonds.[10]

During the infancy of America and because of the undesirability of the strictures of English ecclesiastical law, "[e]ach state, impregnated as it was with its own peculiar religious faith and social philosophies, made laws believed by its legislatures to be necessary to promote permanency of family relationships and protect the social fabric."[11] Most states by 1900 recognized cruelty as a ground for divorce.[12] Regarded as the "remedy for the innocent against the guilty,"[13] the institution of divorce was profoundly influenced by principles of tort law.[14] Long before this time, however, Mississippi territorial law had provided for divorce from bed and board on the ground of "extreme cruelty."[15] By 1840 such decrees were no longer contingent on legislative confirmation.[16] By 1857 the courts of Mississippi were authorized to render a perpetual separation[17] in granting divorces from bed and board. After 1871 divorce *a vinculo matrimonii*,[18] or divorce absolute, could be granted "for habitual cruel and inhuman treatment, marked by personal violence."[19] This latter clause was deleted in the 1878 code,[20] reinserted in the 1880 code,[21] and again deleted in the 1892 code,[22] leaving the statutory ground in its present form[23] upon which the majority of divorces granted in Mississippi are based.[24]

As part of what is now a three-part test for ascertaining the merits of a divorce action on the ground of habitual cruel and inhuman treatment, a standard was articulated by the Supreme Court of Mississippi in *Russell v. Russell*.[25]

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[9]J. BISHOP, MARRIAGE & DIVORCE §§ 50[3], 53[6] (1864).

[10]D. CANTOR, ESCAPE FROM MARRIAGE 23, 24 (1971). The Matrimonial Causes Act of 1857, transferred jurisdiction over divorce to the civil courts, which recognized adultery as the only ground for divorce. The Matrimonial Causes Act of 1937 added the grounds of desertion and cruelty. CLARK, § 11.1, at 282.

[11]MORLAND § 240, at 298.

[12]CLARK § 11.1, at 283.

[13]Brown v. Brown, 198 Tenn. 600, 281 S.W.2d 492, 498 (1955).

[14]CLARK § 11.1, at 283.

[15]Law of Mar. 10, 1803, § 6, [1816] Laws of Miss. 253.

[16]Law of Feb. 22, 1840, ch. 18, § 1, [1840] Laws of Miss. 51.

[17]Law of Feb. 14, 1850, ch. 57 § 2, [1850] Laws of Miss. 122.

[18]This form of divorce effectuates complete dissolution of the marital bonds, conferring upon each party the status of a single person. MORLAND § 244, at 305.

[19]MISS. REV. CODE ch. 23, art. 4, § 1767 (1871).

[20]MISS. CODE ch. 35, § 1562 (1878).

[21]MISS. REV. CODE ch. 42, § 1155 (1880).

[22]MISS. ANN. CODE ch. 35, § 1562 (1892).

[23]MISS. CODE ANN. § 93-5-1 (1972).

[24]E. WINGO, MISSISSIPPI LAW OF DIVORCE 17 (1957).

[25]157 Miss. 425, 128 So. 270 (1930). Cruel treatment, in the absence of personal violence, is:

> such conduct only as endangers life, limb, or health, or creates a reasonable apprehension of danger thereto, thereby rendering the continuance of the marital relation unsafe for the unoffending spouse, or such unnatural or infamous conduct as would make the marital relation revolting to the unoffending spouse

This standard provided a satisfactory basis upon which the interwoven elements of the degree and effect of an offending spouse's conduct could be determined for the purpose of granting or denying a divorce on this ground.[26] The requirements which have emerged from judicial formulation and expansion of the *Russell* doctrine[27] are twofold. First, the complaining spouse is required to show that the conduct of the offending spouse was the type of conduct contemplated by the statute.[28] Although the statutory construction is apparently overlapping and obscure,[29] it is nevertheless clear that such incidents as quarreling,[30] temper tantrums,[31] incompatibility,[32] abusive words,[33] "vile, unrepeatable epithets,"[34] and similarly unpleasant but predictable phenomena of domestic life will not suffice in isolated form.[35] Individual acts, however, may assume the character of a course of conduct which, in aggregate form, may be of the requisite nature, gravity, and duration.[36] For example, a wife's daily accusations of adultery on the part of her husband, resulting in his loss of sleep, nervousness, and fear of losing his sanity if forced to continue such a marital relationship, have been held

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and render it impossible for him or her, as the case may be, to discharge the duties thereof, thus defeating the whole purpose of that relation. *Id.* at 430-31, 128 So. at 272.

[26]*See generally* J. BUNKLEY & W. Morse, AMIS ON DIVORCE & SEPARATION IN MISSISSIPPI § 3.14 (1957) [hereinafter cited as BUNKLEY].

[27]Sandifer v. Sandifer, 215 Miss. 414, 416-17, 61 So. 2d 144, 145 (1952).

[28]*See, e.g.*, Johns v. Johns, 57 Miss. 530, 531 (1879) (definition of habitual); Russell v. Russell, 157 Miss. 425, 428, 128 So. 270, 272 (1930) (definition of cruel and inhuman treatment); McBroom v. McBroom, 214 Miss. 360, 363, 58 So. 2d 831, 832 (1952) (definition of cruel and inhuman).

[29]BUNKLEY § 3.14.

[30]*See, e.g.*, Stringer v. Stringer, 209 Miss. 326, 46 So. 2d 791 (1950); *cf.* Price v. Price, 181 Miss. 539, 179 So. 855 (1938).

[31]*E.g.*, Humber v. Humber, 109 Miss. 216, 68 So. 161 (1915) (wife inconsiderate, disagreeable, abusive, rude, insulting, and inately discourteous).

[32]*Id.*; BUNKLEY § 3.14(11). *Contra*, Annot., 58 A.L.R. 2d 1218 (1958) (incompatibility as ground for divorce); MORLAND § 481 (states recognizing incompatibility as ground for divorce).

[33]*E.g.*, Taylor v. Taylor, 235 Miss. 539, 108 So. 2d 872 (1959) (citing *Russell* doctrine).

[34]Price v. Price, 181 Miss. 539, 179 So. 855 (1938) (husband unable to "effectively attend to his business").

[35]*See* Weinstein, *Cruelty as Grounds for Divorce*, 17 MARQ. L. REV. 101, 111 (1932), in which the author qualifies the proposition that "either or both of the parties must bear in some degree the consequences of slight inherent or acquired differences which are bound to arise in the matrimonial state." *See also* O. WARREN, *supra* note 6, at § 78 (analysis of nagging as a matter of degree).

[36]Manning v. Manning, 160 Miss. 318, 133 So. 673 (1931) (wife enduring acts of cruelty for several years); *accord*, Smith v. Smith, 40 So. 2d 156, 157 (Miss. 1949) (wife's "commendable" endurance of unkind treatment); *see* Sandifer v. Sandifer, 215 Miss. 414, 61 So. 2d 144 (1952) (divorce was granted to a blind, 72-year-old husband whose wife's nagging, slander, unsociability, and threats to poison his food culminated in his leaving home). *But cf.* Ellzey v. Ellzey, 253 So. 2d 249 (Miss. 1971) (A divorce was granted to a wife whose husband had attempted to shoot her with a shotgun and, 25 years before the trial, had hit her on the head with a shovel. The court noted that the former incident should be considered in the context of the latter).

to constitute a course of conduct sufficient to establish habitual cruel and inhuman treatment entitling the husband to a divorce.[37] Second, the complaining spouse must satisfactorily demonstrate the effect such conduct had upon his health.[38] It is clear that he must show more than indigestion,[39] hurt feelings,[40] or nervousness.[41] The conduct, however, may be such that the complaining spouse reasonably apprehends injury to his health by continuing the marital relationship,[42] or the nature of the conduct may be such as "would make the marital relationship revolting . . . and render it impossible for him . . . to discharge the duties thereof . . . ."[43] Such conduct may be deemed to have the equivalent effect of endangering or adversely affecting the health of the complaining spouse to the extent contemplated by the statute. The foregoing requirements presuppose that if the conduct on the part of the offending spouse reaches a certain level of intolerability, then the complaining spouse will necessarily and justifiably leave or otherwise be separated[44] from the offending spouse.[45] This presupposition of separation has been ingrafted onto the

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[37]Hibner v. Hibner, 217 Miss. 611, 64 So. 2d 756 (1953). *Compare* Price v. Price, 181 Miss. 539, 179 So. 855 (1938) (wife's accusations of intimacy with another woman), *with* McCormack v. McCormack, 220 Miss. 116, 70 So. 2d 333 (1954) (husband badgering wife about supposed affair with employer). *See generally* Annot., 143 A.L.R. 623 (1943) (accusations of adultery as ground for divorce); MORLAND § 365.

[38]*See, e.g.*, Skelton v. Skelton, 236 Miss. 598, 111 So. 2d 392 (1959) (conduct not impairing health or endangering life).

[39]*E.g.*, Sarphie v. Sarphie, 180 Miss. 313, 177 So. 358 (1937) (husband was denied a divorce from his wife whose abstinence from successful coition produced in him a "highly nervous state" and gave him indigestion).

[40]*E.g.*, Criswell v. Criswell, 254 Miss. 746, 753, 182 So. 2d 587, 590 (1965) (wife's preference for gambling and nightclubs resulted in extended absences from her husband).

[41]*E.g.*, Skelton v. Skelton, 236 Miss. 598, 603, 111 So. 2d 392, 393 (1959) (wife's affinity for beer resulted in an inordinate gain in weight, which, accompanied by her crying and annoying complaints about her husband's unfaithfulness, caused him to be nervous and lose weight). *But cf.* Hibner v. Hibner, 217 Miss. 611, 612, 64 So. 2d 756, 757 (1953) (nervousness in combination with such additional factors as loss of sleep and general undermining of physical health may satisfy the requirement).

[42]Russell v. Russell, 157 Miss. 425, 430, 128 So. 270, 272 (1930); *accord*, Sandifer v. Sandifer, 215 Miss. 414, 61 So. 2d 144 (1952); *cf.* Ellzey v. Ellzey, 253 So. 2d 249, 250 (Miss. 1971) (husband attempting to shoot wife with shotgun). *But cf.* Stringer v. Stringer, 209 Miss. 326, 46 So. 2d 721 (1950) (wife was denied a divorce from her husband who had brutally choked her on one occasion and was constantly nagging and quarreling with her). *See generally* McNeill v. McNeill, 125 Miss. 277, 284, 87 So. 645, 646 (1921), in which the court held that "it is not necessary that danger to life or health shall in fact exist . . . . In holding that . . . the complaining party must show acts of cruelty which were malicious and actually menacing to life or health, the learned chancellor has applied to the facts in this case an erroneous test and one that is entirely too severe."

[43]Russell v. Russell, 157 Miss. 425, 431, 128 So. 270, 272 (1930); *accord*, Crutcher v. Crutcher, 86 Miss. 231, 38 So. 337 (1905) (husband guilty of crime of pederasty); *cf.* McBroom v. McBroom, 214 Miss. 360, 363, 58 So. 2d 831, 832 (1953) (intemperate, oversexed, jealous husband found to be guilty of "more than mere unkindness or rudeness").

[44]*See* Seagraves v. Seagraves, 193 Ga. 280, 18 S.E.2d 460 (1942).

[45]*See* Hibner v. Hibner, 217 Miss. 611, 615, 64 So. 2d 756, 758 (1953) (wife's accusa-

Russell doctrine as a third and separate element of the three-part test.[46] In *Criswell v. Criswell*[47] the court unveiled the three-part test with the following formulation:

> The burden rested upon [the husband] to prove by clear and convincing evidence that the conduct of the [wife] was not only cruel but that it endangered, or adversely affected, his health or safety and, further, that it was the proximate cause of the separation.[48]

The rationale behind this third element of the three-part test lies between two competing considerations. First, the complaining spouse may have chosen to remain with the offending spouse. On the one hand, a presumption would arise that the conduct of the offending spouse was not so intolerable or revolting as to compel a separation by the complaining spouse, therefore not so extreme as to constitute habitual cruel and inhuman treatment.[49] On the other hand, even though the conduct of the offending spouse may have constituted such treatment, the presumption would arise that the complaining spouse, by virtue of continued cohabitation with the offending spouse, condoned that treatment.[50] Second, the complaining spouse may have separated from the offending spouse. If such separation were for some reason other than the conduct of the offending

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tions of adultery making life "unbearable" for husband); *cf.* Criswell v. Criswell, 254 Miss. 746, 749, 182 So. 2d 587, 588 (1966) (no allegation as to fault of separation); Sandifer v. Sandifer, 215 Miss. 414, 61 So. 2d 144 (1952) (wife's threats to poison husband's food compelling him to eat elsewhere). *Compare* Hinton v. Hinton, 254 Miss. 50, 54, 179 So. 2d 846, 848 (1965) (reversing dual divorce decrees on same ground), *with* McCartney v. McCartney, 217 Ga. 200, 121 S.E.2d 785, 786 (1961). *Contra*, Seagraves v. Seagraves, 193 Ga. 280, 18 S.E.2d 460, 461 (1942) (The husband, who had refused to pay for a fur coat purchased by his impulsive wife, endured her repeated assaults on his person until she finally left him. His endurance of his wife's cruel treatment was held not to have constituted condonation, thus entitling him to a divorce); *cf.* Chamberlain v. Chamberlain, 245 Ala. 105, 16 So. 2d 8 (1943) ("There is no provision here, or for that matter in any provision of the Code, which requires that separation of the parties must appear before a divorce on the ground of cruelty can be secured."). *See generally* BUNKLEY § 3.14(17).

[46]*See, e.g.*, Burnett v. Burnett, 271 So. 2d 90, 93 (Miss. 1972); Hinton v. Hinton, 254 Miss. 50, 54, 179 So. 2d 846, 848 (1965).

[47]254 Miss. 746, 182 So. 2d 587 (1965).

[48]*Id.* at 753, 182 So. 2d at 590.

[49]*See, e.g.*, Price v. Price, 181 Miss. 539, 548, 179 So. 855, 857 (1938) (husband materially contributing to wife's conduct); *cf.* Stewart v. Stewart, 175 So. 2d 692, 694 (La. 1965) (sexual intercourse prior to separation constituting reconciliation).

[50]"[C]ondonation is but a foregiveness [*sic*] on condition of subsequent fidelity, which, if not kept, the rights of the injured party are restored, as if there had been no condonation." Armstrong v. Armstrong, 32 Miss. 279, 289 (1856); *see, e.g.*, Thames v. Thames, 233 Miss. 24, 30, 100 So. 2d 868, 870 (1958) (condonation of first separation not controlling as to second separation). *But cf.* Calhoun v. Calhoun, 278 Ala. 610, 179 So. 2d 737, 739 (1965) (cohabitation necessitated by "parental obligation" not constituting condonation); Carriere v. Carriere, 147 So. 2d 668, 671 (La. 1962) (wife's forebearance and occupying separate bedroom not constituting condonation). For a comprehensive discussion of the doctrine of condonation as utilized in American divorce law, see Moore, *An Examination of the Condonation Doctrine*, 2 AKRON L. REV. 75 (1968-69).

spouse[51] or at a point in time much later than the occurrence of the act, acts, or course of conduct complained of,[52] then the presumption would arise that the complaining spouse was unjustified in separating from the offending spouse. Moreover, under certain conditions such a separation would constitute desertion.[53]

In the instant case, the court reasoned that the crucial factor for consideration was not the defendant's treatment of the complainant, but the lack of any indication that the defendant's alleged conduct was the proximate cause of the separation.[54] Assuming, arguendo, that the defendant had made repeated and false accusations of adultery on the part of the complainant, the court found that the defendant's conduct could not logically be considered the proximate cause of the separation. The testimony had revealed that the complainant was neither unable nor unwilling to leave the defendant; moreover, the defendant had voluntarily separated from the complainant. Therefore, absent any evidence that habitual cruel and inhuman treatment on the part of the defendant was the proximate cause of the separation, the court concluded that the lower court's decree for divorce absolute based on such an incomplete showing of habitual cruel and inhuman treatment must be reversed.[55]

In the instant case, the court has adhered to its policy of strictly construing

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[51]*See* BUNKLEY § 3.14(17). "If a husband or wife abandons the other for any other cause than that of cruelty, no divorce shall be granted for cruel treatment." *Id.*

[52]*See, e.g.,* Scott v. Scott, 219 Miss. 614, 629, 69 So. 2d 489, 494 (1954) (commission of cruel acts several years before separation); *cf.* Smith v. Smith, 40 So. 2d 156, 157 (1949) (second separation following cohabitation after acts of cruelty).

[53]*See* Richey v. Richey, 185 So. 2d 431, 432 (Miss. 1966) (wife's separation constituting willful, continued, and obstinate desertion of husband); *cf.* Lynch v. Lynch, 217 Miss. 69, 80-81, 63 So. 2d 657, 661 (1953) (wife, having separated from her husband, was denied a divorce on the ground of habitual cruel and inhuman treatment, but her husband was granted a divorce on the ground of her desertion for the statutory period). *But cf.* BUNKLEY § 311(12).

> If either party, by reason of such conduct on the part of the other as would reasonably render the continuance of the marital relation unendurable, or dangerous to life, health, or safety, is compelled to leave the home and seek safety, peace, and protection elsewhere, then the innocent one will ordinarily be justified in severing the marital relation and leaving the domicile of the other, so long as such conditions shall continue, and in such case the one so leaving will not be guilty of desertion. The one whose conduct caused the separation will be guilty of constructive desertion and if the condition is persisted in for a period of one year, the other party will be entitled to a divorce.

Id.

[54]*See, e.g.,* Richey v. Richey, 185 So. 2d 431, 432 (Miss. 1966). *But cf.* Note *Divorce on Ground of Separation*, 18 WASH. & LEE L. REV. 157 (1961); Annot., 35 A.L.R.3d 1238 (1971) (separation as ground for divorce).

[55]Similarly, the court has reversed dual divorce decrees on the ground of habitual cruel and inhuman treatment, recognizing the contradiction in considering the conduct of both spouses as "concurring proximate causes of the separation." Hinton v. Hinton, 254 Miss. 50, 54, 179 So. 2d 846, 848 (1965), *noted in* 38 MISS. L.J. 17 (1966); *accord*, McCartney v. McCartney, 121 S.E.2d 785, 786 (Ga. 1961), wherein the court held that granting such decrees "would be manifestly based on diametrically conflicting opinions as to the credi-

one of the major statutory grounds for divorce,[56] thereby not only precluding divorce actions arising out of the potential, numerous, and minor miseries of domestic life, but also perpetuating a marital status which, from a practical standpoint, may have been irreparably disrupted.[57] Such was the dilemma which prompted the court in *Sarphie v. Sarphie* to declare that "[i]n the light of the evidence, it is very probable that these parties will not, in the future, live together as husband and wife, but we are bound by the rules of law."[58] The requisite showing of the degree and effect of the offending spouse's conduct need not be such that it would support a criminal action.[59] The court's prevailing, fault-oriented tendency to restrict the availability of this particular statutory ground, however, necessarily imports a rigid adherence to the outmoded,[60] irrelevant concept of matrimonial fault,[61] in derogation of the modern concept of de facto marital breakdown.[62] By requiring that the habitual cruel and inhuman treatment which allegedly impaired the complaining spouse's health also be the proximate cause of the separation, the court is directing an implicit inquiry into

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bility of the same witnesses." *But see* Cummings v. Cummings, 213 Miss. 863, 58 So. 2d 39 (1952) (no reference to proximate cause, concurring or otherwise); Fleming v. Fleming, 213 Miss. 74, 56 So. 2d 35 (1952); Price v. Price, 181 Miss. 539, 179 So. 855 (1938).

[56]Humber v. Humber, 109 Miss. 216, 226, 68 So. 161, 164 (1915).

[57]The apparently conflicting relationship between the three-part test and the generally accepted doctrine that continued cohabitation per se does not imply condonation of habitual cruel and inhuman treatment was implicitly resolved by the court. Continued cohabitation gives rise to a rebuttable presumption that the "proximate cause" element of the three-part test has not been satisfied. By failing to rebut this presumption with clear and convincing proof that the proximate cause of the separation was habitual cruel and inhuman treatment, a fortiori, by admitting that the offending spouse has left the complaining spouse, the latter has failed to carry his burden of proof and, therefore, is not entitled to relief. Harrison v. Harrison, 285 So. 2d 152 (Miss. 1973); *see* note 2 *supra*.

[58]180 Miss. 313, 319, 177 So. 358, 359 (1937).

[59]M. Ploscowe, The Truth About Divorce 103 (1955).

[60]When people understand that they must live together, except for a very few reasons known to the law, they learn to soften by mutual accomodation the yoke which they know they cannot shake off . . . .

. . . .

Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accomodation [*sic*], even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offences in the marriage-state undoubtedly, not innocent surely in any state of life, but they are not that cruelty against which the law can relieve . . . . [T]he suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the Courts much injustice may be suffered, and much misery produced, the answer is that the Courts of Justice do not pretend to furnish cures for all the miseries of human life.

Evans v. Evans, 1 Hag. Con. 35, 36, 38, 161 Eng. Rept. 466, 467 (1790).

[61]R. Levy, Uniform Marriage & Divorce Legislation: A Preliminary Analysis 44-47 (1969) (criticism of the "matrimonial offense" theory).

[62]Wadlington, *Divorce Without Fault Without Perjury*, 52 Va. L. Rev. 32, 82 (1966).

the possibility of whether that treatment was condoned,[63] provoked,[64] or otherwise deprived of legal effect by some marital offense or omission on the part of the complaining spouse.[65] Such a strict application of the three-part test may indicate a tendency on the part of the court to substitute form for analysis. The court has limited its approach to a mechanical inquiry into the immediate results and apparent nature of the termination of a marriage. Minimal emphasis has been placed on the possibility that the breakdown of a marriage can be attributed to factors unrelated to any "sinful act" of either or both of the parties.[66] Thus, the court has amply justified one authority's characterization of divorce as "an event occurring not in the world of social living but in the universe of formal law."[67]

In the instant case the Mississippi Supreme Court has asserted its intention to protect the state's interest in preserving the dignity, stability, and integrity of the marital institution by refuting the popular belief that divorce on the ground of habitual cruel and inhuman treatment may be obtained easily and often with a minimal amount of proof. Nevertheless, the court's insistence on strict establishment of this statutory ground may not preclude the possibility of "either facile swearing amounting to perjury, or [the] finding of facts to meet the law instead of applying the law to found facts."[68] The court's restrictive

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[63]*See, e.g.*, Scott v. Scott, 219 Miss. 614, 69 So. 2d 489 (1954); Manning v. Manning, 160 Miss. 318, 133 So. 673 (1931). Although an argument may be made that the instant decision discourages reconciliation by holding that a spouse who attempts to save his marriage by enduring cruel treatment may later be denied a divorce because he failed to leave home as a result of such treatment, such an argument overlooks the precise issue dealt with in *Harrison v. Harrison*. The divorce decree was reversed, not because the complaining spouse had condoned any habitual cruel and inhuman treatment, but because he totally failed to prove that such treatment was the proximate cause of the separation. *See generally* MORLAND § 281 (basic principles of condonation); W. NELSON, DIVORCE & ANNULMENT § 11.05 (2d ed. 1945) (anomaly of applying doctrine of condonation). *See also* cases cited note 49 *supra*.

[64]*See, e.g.*, Price v. Price, 181 Miss. 539, 179 So. 855 (1938) (wife's provocation of beating); Ammons v. Ammons, 144 Miss. 314, 109 So. 795 (1926); *cf.* Hibner v. Hibner, 217 Miss. 611, 64 So. 2d 756 (1953) (no finding of provocation for wife's accusations of adultery). *See generally* MORLAND § 529; W. NELSON, DIVORCE & ANNULMENT § 10.07 (2d ed. 1945) (conceptual confusion between defense of recrimination and provocation).

[65]*See generally* BUNKLEY § 4.03 (recrimination distinguished from other defenses); CLARK § 2.12 (summary of defenses); M. MAYER, DIVORCE & ANNULMENT 42-55 (1967).

[66]Wadlington, *supra* note 62, at 82. In addition to perpetuating the "adversary acrimony" of a divorce proceeding, the inquiry into the fault vel non of one or both of the parties is based on a rigid, albeit artificial, statutory ground which is more descriptive of the results than of the causes of a marital breakdown. Baer & Davis, *"Merit" in No Fault Divorce*, 60 ILL. B.J. 766, 767 (1972).

[67]Rheinstein, *Problem of Marriage Stability*, 9 VAND. L. REV. 633, 646 (1956); *see* Comment, *Oregon's No-Fault Marriage Dissolution Act*, 51 ORE. L. REV. 715, 717 (1972), in which the "lack of realism" in the legislative policy behind traditional divorce statutes is considered in conjunction with "archaic, irrational legal procedures."

[68]Pound, *The Law of Divorce*, in SELECTED ESSAYS ON FAMILY LAW 873 (1950).

Collusion between the parties, in order to manufacture legal grounds for termi-

policy, however, is but an amplification of the "more punitive than therapeutic"[69] legislative policy which all but excludes any distinction between the "injured party"[70] in a divorce action and in a suit in tort.[71] A fundamental problem inherent in strictly fault-oriented divorce statutes such as Mississippi's is the presumption that the only marriages which should be dissolved are those which break down due to the occurrence of specific conditions precedent.[72]

Several states have already tried to remedy this fundamental problem of overemphasis on marital fault by liberalizing the statutory grounds for divorce. For example, divorce may be granted in Kentucky without an inquiry into the fault of either party[73] if the court finds that the marriage is "irretrievably broken."[74] In Delaware, a divorce may be granted on the ground of incompatibility "characterized by rift or discord produced by reciprocal conflict of personalities . . . ."[75] Other states authorize divorce on the ground of voluntary, irreconcilable separation of the parties.[76] Therefore, the ultimate burden of mitigating the restrictive effect which the application of the three-part test may have upon otherwise terminated marital relationships rests not upon the Supreme Court of Mississippi, but upon the Mississippi Legislature, "which has ignored this problem and has refused to balance the scales so that our legal institutions reflect our social attitudes on divorce.' "[77]

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> nating their marriage, will generally be successful . . . as the court will not discover the collusion and neither party will raise it, unless perhaps one has had a change of heart. The tragedy is that the parties have to resort to such collusion, but it is necessitated, of course, by the fault doctrine.

Couch, *Toward a More Realistic Divorce Law*, 43 TUL. L. REV. 243, 256 (1969).

[69]Wadlington, *supra* note 62, at 82.

[70]MISS. CODE ANN. § 93-5-1 (1972).

[71]CLARK § 11.1, at 283.

[72]Wadlington, *supra* note 62, at 82.

[73]*See, e.g.*, Smith v. Smith, 497 S.W.2d 418 (Ky. 1973). *See generally* Comment, *No-Fault Divorce: A Proposal For Mississippi*, 45 MISS. L.J. 179, 189-202 (1974) (analysis of the no-fault concept).

[74]KY. REV. STAT. ANN. § 403.40(1)(c) (1973).

[75]8 DEL. CODE ANN. tit. 13, § 1522 (12) (Supp. 1970); *see, e.g.*, Husband W. v. Wife W., 297 A.2d 39 (Del. 1972); Husband M. v. Wife M., 295 A.2d 723 (Del. 1972).

[76]*See, e.g.*, MD. CODE ANN. art. 16, § 24 (1973); N.Y. DOM. REL. LAW. § 170 (McKinney 1973); S.C. CODE ANN. § 20-101(5) (Supp. 1973); TEX. FAM. CODE ANN. § 3.06 (1973); W. VA. CODE § 48-2-4(7) (Supp. 1973). *Compare* Gardner v. Gardner, 50 Ala. 251, 34 So. 2d 157, 158 (1948), *with* Brooks v. Brooks, 201 Ark. 14, 143 S.W.2d 1098, 1100 (1940), *and* Heckman v. Heckman, 245 A.2d 550 (Del. 1968).

[77]Comment, *supra* note 73, at 180; *see* Couch, *supra* note 68, at 258 (analysis of the feasibility of gradual reform vis-a-vis total departure from the fault system).

BOOK REVIEW

THE ELECTRICAL EQUIPMENT CONSPIRACIES by Charles A. Bane. New York: Federal Legal Publications, Inc. 1973. Pp. 554. $17.50.

*George W. Stengel**

The Electrical Equipment Cases are perhaps the most notorious antitrust cases decided since the Standard Oil and American Tobacco cases. This notoriety has resulted from the fact that a large number of corporate executives were given prison sentences; however, as the book reveals, the treble damages actions were of more actual significance than the criminal penalties. Notwithstanding this notoriety, the cases involved the usual type of price-fixing conspiracy. The scope of the conspiracy and the number of large companies involved made the cases unusual.

In the first two chapters, Bane states the essential facts of the conspiracy and discusses the criminal cases in which all of the leading manufacturers of electrical equipment for public utilities in the United States were found guilty of violating the Sherman Act by engaging in price-fixing. The convicted corporate defendants include the following companies: General Electric; Westinghouse Electric Corporation; Allis-Chalmers Manufacturing; McGraw-Edison; Maloney Electric; Wagner Electric; I-T-E Circuit Breaker; Allen-Bradley; Clark Controller; Cutler-Hammer, Inc.; Square D; H.K. Norten; Foster-Wheeler Corporation; Ingersall-Rand; C.H. Wheeler Manufacturing Corporation; Worthington Corporation; and Southern States Equipment Corporation. Numerous other corporations were permitted to plead nolo contendere. In addition to the corporations found guilty, several officers and other agents of the corporate defendants were found guilty or allowed to plead nolo contendere.

Although the fines and prison sentences imposed attracted a great deal of attention, they were in fact quite lenient. The corporate fines ranged from $10,000 to $50,000 and the individual defendants were fined from $1,000 to $7,500. When prison sentences were imposed, they were for 30 days; most of these, however, were suspended. The total of fines imposed on corporations and individuals was slightly in excess of $1 million.

Obviously, the payment of fines was no real burden for the corporate defendants; but they still paid dearly for their collusion. Soon after termination of the criminal cases, almost 2,000 treble damage actions were brought against the corporate defendants. These actions resulted in damage payments aggregating almost half a billion dollars.

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Section 4 of the Clayton Act permits any person who is injured by a violation of the antitrust laws to recover treble damages in a civil action. In conspiracy cases, it is frequently burdensome and very expensive to establish the facts. Section 5 of the Clayton Act, however, provides that a final judgment or decree in a civil or criminal antitrust proceeding brought by the United States shall be prima facie evidence against the defendant in any civil action brought by a private party. Therefore, soon after the judgments in favor of the Government in the criminal electrical conspiracy cases, over 1,900 treble damage actions were filed[1] in 35 federal district courts.[2]

Even with the prima facie rule provided by section 5, the addition of over 1,900 cases placed a formidable burden on the federal judiciary, and new procedures had to be developed for trial of the cases. Under the guidance of Chief Justice Warren, a coordinating committee of federal judges was organized. The committee coordinated pretrial procedures and the examination of hundreds of witnesses and eliminated the necessity for duplication of millions of documents. A Plaintiff's Counsel Steering Committee was created to represent the plaintiffs in matters of common interest. Charles A. Bane, who was counsel for several public utility claimants, was made chairman of the committee. Bane was thus able to observe the litigation from beginning to end, the course of which encompassed slightly more than 6 years. The book which resulted from that observation, *The Electrical Equipment Conspiracies*, offers a vivid and fascinating description of an almost unbelievable antitrust conspiracy and the litigation that arose from it.

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[1]*See* Neal & Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 62 (1964).

[2]It is interesting to note that no electrical equipment treble damage cases were filed in Mississippi.

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